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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1458

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Petitioner,

v.

THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. Misc.

In the Matter of the Application of

THE CITY OF NEW YORK,

Petitioner,

For an Order Pursuant to Article 75 of the Civil Practice Law and Rules,

—against—

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Respondent,

Reviewing the determination of the Respondent in confirming an August 23, 1977, New York City Board of Collective Bargaining Decision and Order and dismissing all Counterclaims.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

Official and Unofficial Reports of Opinions Below

This case originated as an appeal by Respondent-Appellant Patrolmen's Benevolent Association of the City of New York Inc. (The "PBA") from the Order and Judgment of the Supreme Court New York City, Special Term,

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Respondent-Appellant throughout the Petition refers to "Petitioner"; Petitioner refers to Respondent, City of New York.

Part I, Kirschenbaum, J. dated October 25, 1977, and entered on or about November 17, 1977, which granted the request of the Petitioner. The decision was rendered pursuant to Civil Practice Law and Rules Section 7410 and New York City Administrative Code, Section 1173-7.0 (c) (4) (f) confirming an August 23, 1977 New York Board of Collective Bargaining decision and order (Docket No. B C BI 14-77) entitled *"In the Matter of the Impasse between the Patrolmen's Benevolent Association of the City of New York* v. *City of New York"*, and dismissing Respondents counterclaim. The opinion of Kirschenbaum, J. appears as Appendix 1a-3a.

Respondent-Appellant appealed the case to the New York State Appellate Division, First Department. That Court rendered a decision dated July 20, 1978, whereby said Court ordered that the Petition be denied and Petitioner-Respondents motion to dismiss Respondent-Appellants Appeal be upheld, a copy of this opinion appears as Appendix 6a-7a.

The PBA thereupon petitioned for a Writ of Certiorari to the Court of Appeals of the State of New York, the Court of Appeals denied Respondent-Appellants Motion on October 24, 1978, a copy of this order appears as Appendix 70a-71a.

Jurisdiction

Jurisdiction of this Court is envoked pursuant to 28 USC Section 1257.

Questions Presented

The principle questions relate to the jurisdictional mandate of the New York City Office of Collective Bargaining (the "O.C.B."). The O.C.B. convened an Impasse Panel pursuant to the New York City Collective Bargaining Law for the purpose of resolving the then existing impasse between the City of New York, employer, and the P.B.A., the employee bargaining unit. This one member Impasse Panel was appointed to formulate a contract for the July 1976 through June 30, 1978 contractual period. The parties to the dispute continued to meet on their own and under the auspices of the O.C.B. throughout this fact finding period prior to the issuance of recommendations by the Impasse Panel.

Subsequent to the presentation of findings and recommendations by the Impasse Panel, but prior to confirmation of an award by the O.C.B., the parties reached an accord on the terms of a Collective Bargaining Agreement. These terms differed significantly in several respects from the recommendations of the Impasse Panel. Notwithstanding the accord between the parties, the O.C.B. issued an award confirming, in toto, the report and recommendations of the Impasse Panel.

Prior to the appointment of the Impasse Panel and the issuance of its Interim Award on April 22, 1977, the P.B.A. commenced an action against the City of New York for a declaratory judgment ascerting that New York City Police Officers were entitled to a status quo continuation of the salary scales and related benefits established for them and which they had begun to receive for the 1975-1976 fiscal year, which comprised, *inter alia*, the continuance of a six percent wage increase resulting from earlier successful wage freeze litigation.

During the Impasse Panel fact finding, certain activities occurred which are the basis of the instant application; to wit:

1. Did the New York State Court of Appeals err in holding that the Office of Collective Bargaining Award was not jurisdictional defective, arbitrary and irrational, because the Court of New York and the P.B.A. had already resolved the impasse.

2. The Court of Appeals erred in holding the Impasse Panel and New York City Office of Collective Bargaining did not exceed their statutory authority in misapplying and misconstruing Section 1173-7.0 (d) of the New York City Collective Bargaining Law commonly referred to as the "Status Quo" provision.

Constitutional Provision Involved

This case involved Article 1 Section 10 of the Constitution of the United States.

Statement of the Case

After the June 30, *1974* expiration of the parties Collective Bargaining Agreement, the PBA and the City of New York (hereinafter referred to as "the City") entered into negotiations and thereafter, in December, 1974, an Impasse Panel (The Coulson Panel) was appointed to make recommendations pursuant to the New York City Collective Bargaining Law (hereinafter referred to as "N.Y.C.C.B.L."). On April 30, 1975, the Panel issued its report and recommendations which, *inter alia,* recommended a "6% wage increase in the basic rate for *fiscal 1975-76,* effective July 1, 1975" (Docket No. I-115-74).

The Panel's findings were thereafter incorporated into a tentative Collective Bargaining Agreement which representatives of the PBA signed, but, which the City refused to sign.

Subsequently, the PBA brought on a proceeding pursuant to Article 75 of the CPLR by Order to Show Cause, to confirm the award of the Impasse Panel. The City cross-moved to dismiss, but the cross-motion was denied and the Impasse Panel's award was confirmed by an Order and Judgment dated and entered on July 1, 1975.

The City initially began paying the retroactive salary increase for the 1974-1975 fiscal year and the increase ordered for the 1975-1976 fiscal year, in compliance with the terms of the aforesaid July 1st Order. However, in September 1975, the City discontinued paying the six percent 1975-1976 increase, citing as its rational the Financial Emergency Act (hereinafter referred to as "F.E.A.") of 1975, Ch. 868, as amended. Following prolonged litigation, the lower Courts (52 A.D. 2D 42 (1975)) and the Court of Appeals (41 N.Y. 2d (1976), 391 N.Y.S. 2d, 544), held the F.E.A. was *not,* applicable to the mandated six percent increase for fiscal 1975-1976 as recommended by the Coulson Panel. On January 28, *1977,* the City made a lump sum payment to each PBA police officer for that unpaid portion of the 1975-1976 rates. However, the City again refused and continues to refuse to pay the six percent salary increase and related benefits for any subsequent fiscal period.

After continued negotiations and mediation, all to no avail, in March 1977, a one member Impasse Panel was appointed to make findings of fact and recommendations for the *new 1976-1978* contractual term.

After the appointment of the aforesaid "Levin" Impasse Panel in April 1977, the PBA commenced an action against the City of New York, by declaratory judgment in Supreme Court seeking, *inter alia,* a finding that until the PBA and City enter into a new collective bargaining agreement, the City is mandated pursuant to Section 1173-70 (d) of the N.Y.C.C.B.L. to preserve the "Status Quo" by continuing to compute the salaries and related benefits due police members of the PBA at the 1975-1976 fiscal rate of pay. The Corporation Counsel for the City timely served its Answer and no further action has been taken by either party to advance the litigation of this matter.

The one-member Impasse Panel appointed in the contract dispute for the July 1976 through June 30, 1978 period, submitted its Report and Recommendations on June 17, 1977, to the Board of Collective Bargaining of the Office of Collective Bargaining and these were subsequently furnished to the parties (Appendix 8a-27a). On July 15, 1977, the City accepted the recommendations and the PBA rejected them in part. Pursuant to Rule 5.12 (a) of the Consolidated Rules of the Office of Collective Bargaining and Section 1173-7.0 (c) (4) (b) of the N.Y.C.C.B.L. the PBA filed a Notice of Appeal and Petition from the "Levin" Panel recommendations. The city filed its answer on August 4, 1977.

On August 17, 1977, the Board heard oral argument. (Appendix 45a-69a). During argument, counsel for the PBA made a formal motion that it dismiss the proceedings for lack of jurisdiction. They pointed out that as a result of further negotiation and ratification of a proposed contract by the PBA membership on August 10, 1977, all disputed matter had been settled on the basis of the Levin Panel recommendations or on the basis of agreement reached by and between the two parties. PBA counsel

pointed out that the parties' agreement rendered any further action by the Board unnecessary, and a nullity pursuant to the N.Y.C.C.B.L. since the *jurisdictional mandate* of the OCB is predicated upon Section 1173-7.0, to resolve an impasse, if any, (emphasis added); Section 1173-7.0 (c) (3) (a) do what "is necessary to resolve the impasse," and Section 1173-7.0 (c) (3) (a); if a contract is negotiated before the Panel's report is released, even publication is barred except by mutual consent. The PBA, in its argument contended *the Board had already fulfilled its function* because an agreement had been reached thereby meeting the Board's primary mandate, to "mediate" (Section 1173-7.0 (c) (3) (a)) "under the general guidance and direction of the Director" (OCB Rule Section 4.3; added; (emphasis added)).

On August 23, 1977, the OCB by order and decision, formally adopted the Report and Recommendations of the "Levin" Panel in their entirety (Appendix 22a-44a). The City then moved at Special Term before Kirschenbaum, J., for an Order confirming the aforesaid "award" pursuant to Section 7510 of the CPLR and for a Judgment entered upon the confirmation pursuant to Section 7514 of the CPLR. The PBA answered and counterclaimed alleging, *inter alia,* that the OCB had exceeded its jurisdiction in confirming the Impasse Panel's recommendations; that the Court should delete all reference to the "status quo" issue or to the 1976-1977 pay rate entitlements and that the OCB recommendations and award therefrom were "illegal, arbitrary and capricious and in excess of the Panel's and OCB's jurisdiction."

By oral decision, rendered on August 23, 1977, Kirschenbaum, J., granted the City's application pursuant to CPLR Section 7510 (and N.Y.C. Administrative Code Section 117-7.0 (c) (4) (f) thereby ratifying the August 23, 1977,

decision of the New York City Board of Collective Bargaining. (Appendix 28a-48a). A final Order and Judgment, dated October 28, 1977, was entered on or about November 17, 1977.

Respondent-Appellant herein filed a Notice of Appeal and Pre-Argument statement before the Appellate Division, First Department, on November 23, 1977. On July 20, 1978, the Appellate Division, First Department, affirmed the decision of the Order and Judgment of the Supreme Court, New York County (Kirschenbaum, J.).

The Respondent-Appellant's petition for a Writ of Certiorari to the Court of Appeals of the State of New York, and brief in support thereof were served on October 24, 1978. The opinion an order of the New York State Court of Appeals denying Respondent-Appellant's Writ of Certiorari was dated October 24, 1978.

POINT I

The Court of Appeals Erred in Holding the Impasse Panel and New York City Office of Collective Bargaining Did Not Exceed Its Statutory Authority in Misapplying and Misconstruing Section 1173-7.0 (d) of the N.Y.C.C.B.L. Commonly Referred to as the "Status Quo" Provision.

To recapitulate briefly, as a result of the decision in *P.B.A.* v. *City of New York,* (41 N.Y. 2d 205 (1976), 391 N.Y.S. 2d 544) the Court of Appeals expressed its displeasure with any artificial contrivance erected on the part of the City of New York to refrain from carrying out its obligations to pay the six percent salary increase for the 1974/75 fiscal year and the increase due for the following 1975/76 fiscal year. Necessarily then, logic dictates that the

City, although forced by the Court, was paying salary and entitlements due and owed the P.B.A. by virtue of the 1974-1976 binding collective bargainings agreement between the parties.

Following the expiration of the 1974-1976 agreement, the parties were once again without a contract and perforce either had to engage in negotiations producing a new collective bargaining agreement or submit their dispute to an impasse panel pursuant to the provisions of the N.Y.C.C.B.L. (Administrative Code of the City of New York, Section 1173-1.0 et seq.).

Section 1173-7.0 (d) of the N.Y.C.C.B.L. provides as follows:

> Preservation of status quo. During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement, and, if, an impasse panel is appointed during the period commencing on the date on which such panel is appointed and ending thirty days after it submits its report, the public employee organization party to the negotiations and the public employees it represents, shall not induce or engage in any strikes, slowdowns, work stoppages, or mass absenteeism, nor shall such public employee organization induce any mass resignations, and *the public employer shall refrain from unilateral changes in wages, hours, or working conditions.* This subdivision shall not be construed to limit the rights of public employers *other than their right to make such unilateral changes,* or the rights and duties of public employees and employee organizations under state law. For purpose of this subdivision the term "period of negotiations" shall mean the period commencing on the date on which a bargaining notice is filed and ending on the date on which a collective

bargaining agreement is concluded or an impasse panel is appointed. (emphasis added.)

Therefore, as a matter of law, in clear and unambiguous statutory language, the N.Y.C.C.B.L. mandates the maintenance of the "status quo" while the parties have not formally entered into a new collective bargaining agreement.

Pursuant to either procedure (judicial or N.Y.C.C.B.L.), Section 1173-7.0 (d) is beyond peradventure applicable to the parties. How then could the City refuse to continue payments to members of the P.B.A. for the July 1, 1976 to June 30, 1977, fiscal period, at rates *lower* than those mandated by the prior agreement for the 1974-1976 fiscal period.

Nevertheless the Impasse Panel recommended and the O.C.B. adopted as binding upon the parties.

> ". . . [p]ayment of the six percent salary increase pursuant to the award of the Coulson impasse panel (Docket No. 1-116-74) as confirmed in a Supreme Court judgment shall be *deferred* for the period July 1, 1976 through June 30, 1977." (emphasis added).

That the aforesaid recommendation contravenes the spirit and letter of the "status quo" statute is so apparent as to be self-evident.

The City was statutorily required to maintain the status quo in terms of salary. The impasse panel was not legally empowered to disregard, rewrite, or create a new statutory mandate differing from the N.Y.C.C.B.L.

Further, no suggestion may be raised suggesting the P.B.A. waived, in any manner, its insistance before the O.C.B. Board or the Supreme Court proper application of Section 1173-7.0 (d). The P.B.A. is cognizant that any *unilateral* waiver before the Impasse Panel, or Board,

constitutes an incorrect amendment to the N.Y.C.C.B.L. and is bereft of legislative approval. Respondent-Appellant also recognizes that the N.Y.C.C.B.L. does not provide for the employer or the Impasse Panel to *unilaterally* change the applicability of the "status quo" statute either.

It is submitted that when the Board countenanced such a recommendation, it acted in disregard and in opposition to a prescribed legislative standard codified by Section 1173-7.0 (d) of the N.Y.C.C.B.L. The Courts have held that the question of whether an arbitrator has acted in excess of his statutory grant of authority or in disregard of a particular standard prescribed by the legislature is *always* properly with the scope of judicial review. *Caso* v. *Coffey*, 53 A.D. 2d 892, 83 Misc. 2d 614, 372 N.Y.S. 2d 892 (2d Department, 1975).

Respondent-Appellants have shown that the six percent recommendation of the Levin Panel and subsequent ratification by the Board of that recommendation are diametrically opposed to "countervailing law" (Section 1173-7.0 (d) embodying the "declared policy" of the legislature of the State of New York.

In the course of fashioning such a clearly erroneous remedy, the Panel and O.C.B. have produced a document self-evidently violative of a clear and unambiguous statutory mandate thus rendering such award "completely irrational" on its face. A litany of cases and the Court of Appeals have held the aforesaid actions create sufficient public policy considerations to allow the Courts to vacate such an award pursuant to CPLR 75 11(b) (1) (iii). *Matter of National Cash Register Co.*, 8 N.Y. 2d 377. *See, Pavilion Central School District* v. *Pavilion Faculty Assoc.*, 51 A.D. 2d 387, 380 N.Y.S. 2d 387 (4th Dept. 1976); *County Wide Insurance Co.* v. *Dibona*, 88 Misc. 2d 798, 388 N.Y.S. 2d 990 (Sup. Ct. N.Y. City, 1976).

If the "status quo" requirement of the N.Y.C.C.B.L. is to be altered, it should be attempted directly through the legislative process and not surreptitiously through arbitrary fiat by the very person or agency charged with adhering to and furthering its clear and unambiguous intent. *See, Matter of Associated Teachers of Huntington,* 40 A.D. 2d 122, 338 N.Y.S. 2d 45, 49 (2d Department, 1972).

In the interim, the integrity of both the legislative and collective bargaining process requires continuity of proper application. The Board of Collective Bargaining acted in an arbitrary, capricious and unreasonable manner, in excess of its statutory authority and should not have confirmed the findings and recommendations of the Levin Impasse Panel.

REASONS FOR GRANTING THE WRIT

POINT II

The Decision of the New York State Court of Appeals is in Conflict With Article I Section 10 of the United States Constitution. It So Distorts the Usually Accepted Principles of Contract That the Result Will Do Damage to a Basic Constitutional Safeguard Unless This Court Resolves the Conflict.

A

As noted, after the Impasse Panel had presented its findings and recommendations to the parties and Director of the O.C.B., but *before* ratification by the Board, the parties had reached an accord on the terms of a collective bargaining agreement, which included important modifications in the terms of the Impasse Panel recommendations. Counsel for the P.B.A. so informed the O.C.B. and, indeed, on August 17, 1977, made a formal motion on oral argu-

ment (Appendix, 46a-50a) and by subsequent letter to the Chairman of the O.C.B. (Appendix 48a-50a) that the O.C.B. dismiss the proceedings for lack of jurisdiction.

That negotiations and agreements between the P.B.A. and City had resulted in an agreement sufficient to constitute a contractual arrangement among the parties may not be contravened. At oral argument of August 17, 1977, P.B.A. counsel apprised the Board "that the negotiations resulted in a collective bargaining agreement" (Appendix, 49a-64a stating.)

> The parties met and agreed that the terms of the arbitrator's award would be modified in many respects. They discussed among other things what to do about the court case which the P.B.A. had started, which concerned the continuation of the benefits which had been awarded under the earlier Impasse Panel Award, and in a 1975 Supreme Court Judgment. And they agreed to modify the terms of the arbitrator's award, and agreed further that as a part of that collective bargaining agreement, the P.B.A. could continue its court suit subject to whatever defenses the City had.
>
> In that connection, the P.B.A. advised the City that it required the ratification of its membership vote. So on July 25th, Samuel De Milia, as President of the P.B.A., sent a letter to all of the 20 some odd thousand members. And this letter reflected the terms that had been agreed upon in the negotiations. And I would like to hand up a copy of the letter for the Board.

Counsel for the City then conceded the July 25, 1977, letter of Samuel DeMilia (Appendix 47a-48a) had been received by the City *prior* to the scheduled ratification vote by the P.B.A. membership *and had not then objected to its contents* (Appendix 47a-48a). P.B.A. counsel then reiterated that the July 25, 1977, letter was the result of negotia-

tions among the parties, contained provisions at variance with the Impasse Panel and that the City had been in receipt of the terms as expressed in the aforementioned letter prior to the ratification vote. He further stated that *no objection* to the contents therein had been made by the City, as a consequence, the impasse was broken and the mandate of the Impasse Panel as well as the Board was terminated. (Appendix 48a-49a, 57a).

Counsel for the City offered *no evidence whatsoever* in refutation of Petitioners evidence. In point of fact, when speaking with reference to the six percent issue, counsel for the City, went so far as to concede that the City had agreed to the contents of the DeMilia letter, including the right of the P.B.A. to continue pursuit of a judicial resolution of the 1976-1977 six percent pay issue as part of the aforesaid collective bargaining agreement.

> Mr. Friess: If I may interject one other thought for whatever it is worth. Mr. Cammer said that the City agreed that they would take their case to court; that is true.
>
> The City, as part of the total package the P.B.A. wanted to give to its membership, *agreed* that as a condition precedent to their going to court we would not extract from them a waiver that they could not use that forum if it were available to them. (Appendix 52a) (emphasis added).

After the prior admission, counsel for the City then attempted to extricate himself by contending that the City's agreement with the P.B.A. concerning the six percent issue could not be defined as an agreement because final resolution of the dispute was in the hands of the judiciary, even though the parties, he conceded, had mutually agreed to this procedure as part of a resolution of their impasse. (Appendix 54a).

Finally, counsel for the City advanced the novel argument that although concededly, an agreement had been reached by and between the parties and a vote ratifying the contents thereof had been held by the P.B.A., he, would not concede the existence of same because no formal letter had yet been proffered to the Board advising it that the impasse was broken (Appendix 60a). To which, P.B.A. counsel replied (Appendix 60a-61a):

> Mr. Linnick: Well, that can be accomplished right now. If I were to say to Mr. Friess, for example, that we can consummate that immediately by taking Professor Levin's recommendations, added to what substantially was submitted to the membership, and agreed upon, and we have a completed agreement with one caveat, that I would draft as part of that agreement that it was agreed that the P.B.A. could continue to pursue its court action, which was the whole subject of discussion.
>
> Now that being so, you have your completed agreement, and that can be done verbally right this second.
>
> Mr. Friess: Were I inclined to do that you may not have a case or controversy in front of you. I decline to do that, therefore you do have a case or controversy in front of you.
>
> Mr. Linnick: I am just saying that as a method of demonstrating that the City is trying to create an issue. And I think that has been clearly done.

By virtue of the foregoing oral argument and by letter to the Chairman of the New York Board of Collective Bargaining, dated August 22, 1977, counsel for the P.B.A. contended that pursuant to relevant statutory authority and from the complete absence of evidence to the contrary, the impasse had been resolved prior to the confirmation of the

Impasse Panel's recommendations. Of course, the City, preserved its right to defend the six percent pay reduction case, just as it did not demand that the P.B.A. withdraw it as a condition precedent to the collective bargaining agreement. This, however, did not give cause or "right" to have the O.C.B. affirm the Levin recommendations. In so doing, the O.C.B. contravened its own statutory mandate to seek a mutually satisfactory resolution of the impasse by and between the parties and engaged in a capricious intrusion into the bargaining process.

In *Pavilion Central School District* v. *Pavilion Faculty Association*, 51 A.D. 2d 119, 380 N.Y.S. 2d 387, 391-392 (4th Department, 1976), the Court held, *inter alia*, that the grounds necessary to vacate an arbitration award must be found within the limitations posed by Article 75 of the CPLR. The *Pavilion* Court then qualified the permissible scope of relief which may be fashioned without becoming vulnerable to judicial vacatur pursuant to CPLR 7511 (b) (1) (iii). The Court stated:

> Rationality of the accorded relief remains a prerequisite to an arbitrators power and authority. . . . (380 N.Y.S. 2d at 392).

Petitioner herein has clearly shown that the action undertaken by the O.C.B. in ratifying the recommendations of the Impasse Panel are in diametric opposition to the declared public policy of the New York State legislature as expressed by the aforementioned New York City Collective Bargaining Law (Point I) and O.C.B. rules and must therefore be "completely irrational" within the meaning of *Pavilion*. *See, Lentine* v. *Fundaro*, 29 N.Y. 2d 382 (1972). *Sedita* v. *McDevitt*, 53 A.D. 2d 300, 385 N.Y.S. 2d 647 (4th Department, 1976); *Country Wide Insurance Co.* v. *Dibona*, 88 Misc. 2d 798, 388 N.Y.S. 2d 990 (Sup. Ct. Nassau County, 1976).

B

A "contract", as used in its ordinary sense, which is not contrary to public policy and is formed between parties competent to contract is constitutionally protected against hostile legislation. *Chase* v. *Curtis*, 113 U.S. 452, 5 S. Ct. 554. The constitution does not differentiate between different kinds or classes of contracts. By its terms and spirit, it subsumes under its penumbra of protection, all valid contracts whether executed or executory, express or implied. *Long Island Water Supply Company* v. *Brooklyn*, 166 US 685, 17 S. Ct. 718; *Filipkowski* v. *Springfield F & M Insurance Company*, 206 Wis. 39, 238 NW 828; *Farrington* v. *Tennessee*, 95 US 679; *Dartmouth College* v. *Woodward*, 4 Wheat (US) 518; *Fletcher* v. *Peck*, 6 Cranch (US) 87; *Krane* v. *Hahlo*, 258 US 142, 42 S. Ct. 214; *Morley* v. *Lake Shore M. S. R. Co.*, 146 US 162, 13 S. Ct. 54; *Seton* v. *Hoyt*, 34 Or 266, 55 P. 967.

The constitutional provision against the impairment of contracts applies to express contracts and specific agreements, and includes all cases wherein the law operates to complete the contract by implying an obligation upon the part of one of the parties thereto. *Seton* v. *Hoyt, supra.* In the instant case the negotiating parties had completed all conditions precedent to the Collective Bargaining Agreement and had followed past precedent with respect to notification of their respective constituancies merely leaving formal execution of a document to memorialize the final agreement.

C

Neither a state by act of its legislature nor may an administrative body by implication alter the nature and legal effect of an existing contract, or give to such contract a judicial construction binding on the parties or the courts.

King v. *Dedham Bank,* 15 Mass 447. Similarly, the legislature may not make a law for a particular case nor an administrative body promulgate an award between two existing parties that is contrary to existing law and order the court to enforce it. *Ervine's Appeal,* 16 PA 256.

The impairment clause although liberally construed is not absolute. However, the courts have enunciated the broad principle that the provision of the Federal Constitution prohibiting the impairment of the obligation of contracts are intended to prohibit every mode or device, transparent or obvious, which has as its purpose or result impairment of the obligation of contract between the parties thereto. *Carondelet Canal and Navigation Company* v. *Louisiana,* 233 US 362, 34 S. Ct. 627.

In *Northern R. R. Company* v. *Minnesota,* 208 US 583, 28 S. Ct. 341, the court stated that legislation which deprives one of the benefit of a contract or adds new duties or obligations thereto necessarily impairs the obligation of the contract; and when the state court gives effect to state or municipal legislation which has the effect of impairing contract rights by depriving the parties of their benefit and of making requirements which the contract did not theretofore impose upon them, a case is presented for the jurisdiction of the United States Supreme Court. Conversely, if the administrative action does not encroach upon valuable contractual rights, the obligations of contract have not been impaired. *State School Building Finance Committee* v. *Belts,* 216 Cal App 2d 685, 31 Cal Rptr 258. More specifically, an action of an administrative agency, subsequently ratified by state courts which, necessarily, changes the intention and or legal effect between the original parties, giving to one a greater or to the other a lesser interest or benefit, impairs its obligation. Concomitantly, a law or administrative action may transgress the constitutional prohibition against impairment of contract obligations by implication as well as by expression.

In the instant case, evidence was adduced, which indicated that the City of New York and the P.B.A. had satisfied all conditions precedent to the resolution of their dispute. Impasse negotiations primarily serve to promote the public good and protect the health and welfare, by preventing disruptions or impairments to necessary public services. It is also designed to force the parties into a further examination of their bargaining posture to avoid the imposition of a settlement by a third or external party. Here, the public employer and the municipal employee bargaining unit had reacted affirmatively to the "threat" of an imposed settlement and had followed the traditional routes between the parties to formally agree upon a new Collective Bargaining Agreement. Furthermore, the City of New York failed to dispute they had received a memorandum from the P.B.A. embodying said agreement, had failed to object to any provision thereto and were now at the final step which was to memorialize and execute the Collective Bargaining Agreement. Thus, the impasse which had triggered the intervention of the O.C.B. had been resolved, a meeting of minds had occurred, a mutuality of understanding existed and a contract by implication existed.

A reading of the New York City Collective Bargaining Law clearly sets forth the operational parameters of the O.C.B. Rule 4.3 entitled "Panel-Functions," states in part:

> "It shall be the duty of the Panel to assist the parties to reach a *voluntary* and satisfactory agreement . . ." (emphasis added).

O.C.B. Rule 4.4 entitled "Panel-Guidance by Director," states in part:

> "The Panel shall perform its duties under the general guidance and direction of the Director, to whom it shall report the progress of the mediation and the terms of *any settlement* . . ." (emphasis added).

The foregoing rules must be considered in conjunction with the following New York City Collective Bargaining Law sections. Section 1173-7.0 (c) (3) (a) states:

> An Impasse Panel shall have the power *to mediate,* hold hearings, compel the attendance of witnesses and the production of documents, review data, and take whatever action it considers necessary *to resolve the impasse* . . . (emphasis added).

Clearly, the statutory scheme is premised upon achieving the resolution of an "impasse". That the resolution grew out of a combination of mediation and private negotiations between the parties cannot render the "resolution" thereof a nullity. Indeed, New York City Collective Bargaining Law Section 1173-7.0 (c) (3) (d) addresses an analogous situation wherein the parties have achieved a collective bargaining agreement prior to "publication" of the report. It states in pertinent part:

> . . . provided that if the parties conclude a collective bargaining agreement prior to the date on which the report is to be released, the report shall *not* be released except upon consent of the parties. (emphasis added).

Where as herein, the "impasse" has been resolved (New York City Collective Bargaining Law Section 1173.70 (c) (3) (a)) and the parties have reached a "voluntary and satisfactory agreement" (O.C.B. Rule 4.3) containing a "settlement" (O.C.B. Rule 4.4) of the controversy the statutory obligations of the Impasse Panel and Board are at an end.

The Federal Constitutions prohibition upon the impairment of contract can not be constrained by the actions of an administrative agency which would deprive the parties of their independent right to resolve a collective bargaining impasse between themselves prior to the imposition of a foreign settlement.

Petitioner does not assert that fact finding and impasse procedures are not of value, however, it would be a dangerous precedent to allow the machinery of State impasse procedures to subvert a pre-existing contract, a right guaranteed by the Federal Constitution.

CONCLUSION

This writ should be granted to prevent manifest injustice in this case and the multiplication of such errors in thousands of pending and future cases.

DATED: New York, New York
February 23, 1979

Respectfully submitted,

HARTMAN & LERNER, ESQS.
Attorneys for Respondent-Appellant
711 Third Avenue
New York, New York 10017
(212) 687-5720

Of Counsel:
EUGENE N. AXELROD

APPENDIX

APPENDIX A

(Order and Judgment)

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse, 60 Centre Street, New York, New York on the 28 day of October, 1977.

Present:

Hon. IRVING KIRSCHENBAUM,

Justice.

Index No. 42058/77

In the Matter of the Application of
THE CITY OF NEW YORK,

Petitioner,

For an Order pursuant to Article 75 of the CPLR,

—against—

PATROLMAN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Respondent.

Petitioner The City of New York having made an application for an Order pursuant to Section 7510 of the CPLR confirming the August 23, 1977 New York City Board of Collective Bargaining Decision and Order (Docket No. BCBI-14-77) in the case entitled *In the Matter of the Im-*

passe between the Patrolmen's Benevolent Association of the City of New York, Inc. v. *City of New York,* and for a Judgment entered upon said confirmation pursuant to Section 7514 of the CPLR, and respondent Patrolmen's Benevolent Association of the City of New York, Inc. (hereafter "PBA") having, among other things, opposed the City's application for confirmation and having requested that the Court vacate or modify the Decision and Order; and the parties having stipulated on the record to advance the hearing of the said application from September 30, 1977 at Special Term, Part I of this Court to September 26, 1977;

Now, upon reading and filing the Notice of Petition and Petition herein, respectively dated and verified August 24, 1977, with the exhibits annexed thereto, and the Affidavit of James G. Greilsheimer, Esq., Litigating Assistant Corporation Counsel of the City of New York, sworn to September 29, 1977, with the exhibits annexed thereto, all in support of the said application; the Answer and Counterclaim, verified September 26, 1977, and Affirmation and Points of Robert Cammer, Esq., dated September 29, 1977, with the exhibits annexed thereto, all in opposition to petitioner's said application to confirm and in support of the relief sought in the counterclaims; and the New York State Emergency Financial Control Board (hereafter "EFCB") having appeared before the Court by Louis J. Lefkowitz, Attorney General of the State of New York (Daniel Cohen, Esq., Assistant Attorney General, and John Bender, Esq., General Counsel to the EFCB, of counsel) and having stipulated that the EFCB has no objection to the prosecuting of this proceeding; and petitioner having appeared by W. Bernard Richland, Corporation Counsel of the City of New York (James G. Greilsheimer, Esq., Litigating Assistant Corporation Counsel, and Steven C. DeCosta, Esq., Assistant Corporation Counsel, of counsel); and respondent having appeared by Phillips, Nizer, Benjamin, Krim & Ballon (Robert Cammer, Esq., of counsel); and oral argument having been had before the Court on September 26, 1977; and due deliberation having been had thereon; and upon the oral decision of the Court, rendered on September 30, 1977;

Now, upon motion of W. Bernard Richland, Corporation Counsel, attorney for the petitioner, it is

ORDERED that the petitioner's application be and the same hereby is granted in all respects, and it is further

ORDERED, ADJUDGED AND DECREED that the Decision and Order of the New York City Board of Collective Bargaining in the case entitled *In the Matter of the Impasse Between the Patrolmen's Benevolent Association of the City of New York, Inc.* v. *City of New York,* dated August 23, 1977, be and the same hereby is confirmed and is incorporated herein and as such it's adapted by the Court and it is further

ORDERED that the respondent's counterclaims be and the same hereby are dismissed.

ENTER:

/s/ IRVING KIRSCHENBAUM
J.S.C.

/s/ NORMAN GOODMAN
Clerk

Appendix A

(Letterhead of Office of Collective Bargaining)
250 Broadway
New York, N. Y. 10007
(212) 566-3932

November 14, 1977

To Whom It May Concern:

I hereby certify that pursuant to the New York City Collective Bargaining Law, I am the Director of the Office of Collective Bargaining as well as Chairman of the Board of Collective Bargaining. I also certify that I have the responsibility for the maintenance of the official records of the Board of Collective Bargaining.

I further certify that the attached Decision No. B-9-77 of the Board of Collective Bargaining is a true copy of the original, published decision pursuant to NYCCBL §1173-5.0a(8), the original signed copy of which is on file in the Board's offices at 250 Broadway, New York, N.Y.

/s/ Arvid Anderson
Arvid Anderson
Director, OCB

Appendix A

SUPREME COURT
OF THE STATE OF NEW YORK

Special Term Part I, New York County
at the Courthouse thereof,
60 Centre Street,
New York, New York, 10007.

Present:

Hon. Irving Kirschenbaum,
Justice.

In the Matter of the Application of

City of New York,

—against—

Patrolmen's Benevolent Association, etc.

The following papers numbered (Memo)

Upon the foregoing papers this application is disposed of in accordance with decision dictated on record on September 30, 1977.

Settle judgment.

Irving Kirschenbaum
J.S.C.

Dated 9/30/77

County Clerk's No. 42058, 1977

Spec I Liber C185 Line 9, 1977

Appendix A

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on July 20, 1978.

Present—

HON. THEODORE R. KUPFERMAN,
Justice Presiding;

VINCENT A. LUPIANO,
HAROLD BIRNS,
LEONARD H. SANDLER,
JOSEPH P. SULLIVAN,
Justices.

3172

In the Matter of the Application of

THE CITY OF NEW YORK,

Petitioner-Respondent,

For an Order pursuant to Article 75 of the CPLR,

—against—

Patrolmen's Benevolent Association of the City of New York, Inc.,

Respondent-Appellant.

Appendix A

An appeal having been taken to this Court by the respondent-appellant from an order and judgment (one paper) of the Supreme Court, New York County (Kirschenbaum, J.) entered on November 17, 1977, which granted petitioner's application for an order confirming an August 23, 1977 New York City Board of Collective Bargaining Decision and Order and dismissed respondent-appellant's counterclaim, and said appeal having been argued by Mr. Eugene N. Axelrod, of counsel for the appellant, and by Mr. L. Kevin Sheridan, of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered that the order and judgment so appealed from be and the same is hereby affirmed, without costs and without disbursements.

ENTER:

/s/ JEROME L. REINSTEIN
Deputy Clerk.

APPENDIX B

(Impasse Panel Report and Recommendations)

OFFICE OF COLLECTIVE BARGAINING

THE CITY OF NEW YORK

In the Matter of the Impasse

—between—

THE PATROLMEN'S BENEVOLENT ASSOCIATION

—and—

THE CITY OF NEW YORK

RE: I-130-77

Appearances:

For the Patrolmen's Benevolent Association:

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON, Esqs.
By: STUART LINNICK, Esq.
GEORGE R. FEARON, Esq.

For the City of New York:

HERMAN E. COOPER, Special Counsel
ALAN FRIESS, Esq.
ROBERT H. PICK, Esq.

Before:

EDWARD LEVIN, IMPASSE PANEL

Appendix B

BACKGROUND

The prior contract period between the PBA and the City expired June 30, 1976 and there was no written contract for the period July 1, 1974 through June 30, 1976. Instead, the terms governing the period were, in part, the recommendations contained in the Impasse Panel Report of April 20, 1975, which were later confirmed by the New York County Supreme Court. These recommendations modified the earlier written contract, which expired June 30, 1973, and which was extended for one year. The parties commenced negotiations in June, 1976 and numerous bargaining sessions were held at which the issues herein recommended as well as others were discussed.

On June 30, 1976 the PBA, as well as other City unions, agreed to abide by the terms and conditions of an agreement which has come to be known as the "Hilton Agreement." This agreement was sought by the City as the basis for obtaining federal funds to alleviate its grave financial difficulties. It provides, among other things, for a freeze on wage or fringe increases to City employees for the period ending June 20, 1978. Its terms specifically provide for the PBA to contribute its share of two annual $24,000,000 "give backs" to satisfy an overall City budget requirement.

Of interest are the events prior to March, 1977 during which the parties had achieved two tentative agreements. In addition, Dean Michael Sovern of the Columbia University Law School, serving as mediator, issued a "package" of recommendations on the issues. Both the tentative agreements and Dean Sovern's recommendations were either rejected or not passed upon by the delegate assembly of the PBA.

Appendix B

On March 29, 1977, the undersigned was designated as a one person impasse panel by the Office of Collective Bargaining pursuant to Section 1173-7.9(c)(2) of the New York City Collective Bargaining Law (Administrative Code Chapter 4; Local Law 53-1967 as amended by Local Laws 1 and 2 of 1972) to "mediate, hold hearings . . . and take whatever action is considered necessary to resolve the impasse" between the Patrolmen's Benevolent Association (PBA) and the City of New York (The City), and to "render a written report containing findings of facts, conclusions and recommendations for terms of settlement." [NYCCBL 7.0(c)(3)(a)]*

On April 8, 1977 after several formal hearings and many days of mediation the undersigned issued an Interim Report and Recommendations providing for immediate pay-

* The criteria stated in the New York City Collective Bargaining Law [Sec. 1173-7.0(c)(3)(b)] with respect to impasse panel findings and recommendations are:

1. comparison of the wages, hours, fringe benefits, conditions and characteristics of employment of the public employees involved in the impasse proceeding with the wages, hours, fringe benefits, conditions and characteristics of employment of other employees performing similar work and other employees generally in public or private employment in the New York City or comparable communities;
2. the overall compensation paid to the employees involved in the impasse proceeding, including direct wage compensation, overtime and premium pay, vacations, holidays and other excused time, insurance, pensions, medical and hospitalization benefits, food and apparel furnished, and all other benefits received;
3. changes in the average consumer prices for goods and services, commonly known as the cost of living;
4. the interest and welfare of the public;
5. such other factors as are normally and customarily considered in the determination of wages, hours, fringe benefits, and other working conditions in collective bargaining or in impasse panel proceedings.

Appendix B

ment of "old" COLA effective July 1, 1976 as well as certain deferrals in accordance with the Hilton Agreement. The Interim Report, by thus disposing of these more difficult and pressing issues, has had a salutary effect and opened the way for productive mediation sessions as well as the further hearings concerning the remaining issues. Witnesses were sworn and a transcript was taken of the formal hearings. Voluminous other material including awards, briefs, transcripts of prior proceedings and other written documents were presented to the Panel by the parties. In addition, the Panel greatly benefited from the information generated by the informal mediation sessions as well as from the formal proceedings.

THE SALARY ISSUE

The Coulson Panel Award of April 30, 1975 (Docket No. I 115-74) rejected the PBA's attempt to achieve a salary level which would have had the effect of breaking the existing salary relationship between it and other uniformed forces in the City. Accordingly, and in line with other collective bargaining agreements for the period 1974-1976, the PBA received an 8% increase for the first year of that period and a 6% increase for the second year.

Subsequently, all other City unions, with the exception of the PBA, bacame a party to a deferral agreement which provided for deferral of the 1975 salary increases for a period of one year. The deferral also provided for the giving up of a work rule which, in the case of all other uniformed police unions, represented the elimination of one "blood day". The PBA was not a party to the standard deferral agreement, and established in litigation, through the Court of Appeals, that it was not subject to the terms thereof. However, the panel notes that the failure of the

PBA to defer has created an anomaly that has generated considerable discord and controversy in this impasse as well as in the overall municipal labor relations in the City of New York.

The City contends that this panel should recommend a deferral of the 6% increase for 1976-1977. Such a recommendation, it notes, would be consistent both with the tentative agreements already reached between the City and the PBA and with the Sovern Recommendations. To do otherwise, it argues, would create an imbalance in the total financial structure under which the City has been operating during its fiscal crisis and would represent a departure from the recommendations of the Coulson Panel.

In opposition to a deferral of the 6% increase for 1976-1977, the PBA contends that the Coulson Panel Award did not represent a recommendation for a rigid salary relationship among the uniformed forces. It merely declined to recommend the salary level urged by the PBA. Thus, the PBA argues, no reliance may be placed upon the Coulson Award for purposes of the City's proposals on these issues.

The PBA contends that whatever imbalance the City perceives is the result of the City's own refusal to execute a collective agreement incorporating the Coulson Panel recommendations. This refusal necessitated a judicial confirmation of the award and a determination that the PBA was not obligated to defer the 6% increase for 1975-1976.

The PBA further contended that a deferral of the 6% increase for 1976-1977 would be contrary to prevailing status quo requirements since it would represent, in effect, a salary reduction. In this connection the PBA filed a law suit in New York Supreme Court in April 1977 for continuation of the 6% salary increase recommended in the Coulson Award. The PBA urges that, in the light of this

current litigation concerning the 6%, the Panel defer its recommendations on this issue.

While the above recitation of positions considerably abbreviates the arguments advanced by the parties, the Panel has carefully considered the arguments and it is the Panel's conclusion that the adverse consequences of not recommending a deferral of the 6% increase for 1976-1977 would outweigh the arguments advanced by the PBA. Moreover, the Panel takes notice of previous recommendations as well as the tentative agreements reached by the parties in the past.

Insofar as the Coulson award is concerned, the panel does not believe that it is necessary to determine precisely what was recommended therein. It is instructive in its effect but does not dispose of the precise issue herein, particularly since questions of deferrals were not a consideration at the time the Coulson award was conceived.

As for the PBA's contention that any imbalance is of the City's own making, that does not answer the problem of comparability. The reality of the imbalance and the financial situation remain in conflict with the statutory criteria of comparability.

The PBA argues that applicable status quo requirements in New York City mandate the continuity of the 6% increase until such time as the parties reach an agreement to the contrary or an impasse panel recommends otherwise. It contends, therefore, that police officers should have been receiving the 6% salary increase since July 1, 1976 and the City is being rewarded for its delay in not having implemented it. The City, on the other hand, contests the applicability of such status quo requirements in this matter. For the reasons set forth below, the Panel does not believe that status quo requirements create an irreconcilable

conflict with the Panel's mandate to fashion salary recommendations in this matter. Had the Panel issued its recommendation prior to July 1, 1976, status quo could not have been raised as an issue. Under such conditions, the right of the Panel to make recommendations effective July 1, 1976 is clear. Since the Panel's mandate is to fashion recommendations commencing July 1, 1976, the Panel is not precluded from exercising its legitimate responsibility to so rule simply because it is considering the issues at a time after July 1, 1976.

Finally, the Panel has considered the PBA's contention that the Panel itself defer consideration of this issue in the light of its current litigation. The difficulty with this position is that it leaves the salary issue in limbo with possible adverse and unintended consequences for all concerned. First, the Panel would, in its opinion, be remiss in not taking into consideration the possible result of the litigations. If the PBA were to be successful in this litigation, it was made clear by the City that the PBA would exhaust its right of appeal. The time involved in the appeals process would probably result in a final determination until sometime in 1978 or later. In the interim, there would be no increases for police officers. This would be most disruptive to the City and financially disadvantageous to police officers.

This disadvantage in not receiving a 6% increase commencing July 1, 1977 (as I am recommending herein) would be compounded even more if the PBA were not to prevail in the litigations. Thus, the Panel declines to defer making a recommendation, but instead will, as specified herein, recommend the implementation of the 6% increase commencing July 1, 1977.

Therefore, the Panel recommends that payment of the 6% salary increase pursuant to the award by the Coulson Impasse Panel (Docket No. I-116-74) as confirmed in a Supreme Court judgment, shall be deferred for the period July 1, 1976 through June 30, 1977. Such deferral shall be subject to each and every term and condition of the deferral agreements covering the period 1975-1976 as executed by the other municipal labor unions. It is understood that effective July 1, 1977 the aforesaid deferred 6% salary increase shall be included in the salary of police officers as expeditiously as possible. In addition, it is recommended that one "blood" day shall be eliminated as a benefit effective July 1, 1976.

FRINGE BENEFIT COST REDUCTION CREDITED TO NEW COLA

The City has sought the right to initiate a payroll lag of one week for all police officers as well as elimination of City depository check cashing accounts. In addition, the City has sought that optional work during vacations be at the discretion of the Police Department. Each of these matters was a part of previous tentative agreements and savings therefrom were to be credited either to the PBA's portion of the $24,000,000 shortfall or to new COLA. The PBA disputes the relevancy and weight to be accorded the prior tentative agreements referred to by the City. The PBA's position is that the City has not demonstrated the need sufficiently to impoes these burdens on police officers, particularly when viewed in conjunction with other changes the City seeks to impose.

In the light of the acceptance of the payroll lag and elimination of check cashing depositories by the majority of City unions, and after considering the arguments of the

parties and the totality of recommendations in this report, the Impasse Panel finds as follows:

(a) The City shall have the right to initiate a payroll lag of one week for all employees covered by this agreement in accordance with a schedule to be determined by the City.

(b) The City may eliminate its depository check cashing accounts.

(c) Optional work during vacations shall be at the discretion of the Police Department. However, no police officer will be discriminated against in the application of this provision because the officer is in the last year of service.

The savings generated by these provisions shall be credited towards the PBA's share of the $24,000,000 per annum fringe benefit "give-back". Any overage resulting from this recommendation shall be applied to the "new" COLA as outlined by the Hilton Agreement.

Duty Charts

The PBA has urged a modification of the existing twenty-squad duty charts. These modifications were proposed because the PBA claims that the existing duty schedule places undue stress on the police officers and creates hardships for them not only on patrol but during their off days. They complain that the fifty-six-hour swings are insufficient to allow them adequate rest between tours and that they have the effect of depriving them of real time off. Therefore, the PBA urges that the impact of the existing duty schedules upon family life is particularly destructive. Testimony from family members has been heard by the Panel in support of such position. Accordingly, the PBA

urges that the number of fifty-six-hour swings be reduced to three per year and that all other swings be designed so as to be in excess of fifty-six hours. In addition, under the PBA proposal there would be a total of twenty minutes per tour for training and five minutes pre-tour unsupervised time for dressing and five minutes post-tour time for preparation of reports. The PBA also suggested that those full days set aside each year for area training be eliminated and that the time saved be allocated to training in each tour.

The City presented the Panel with the Glushien Panel Report & Recommendations issued August 10, 1976 which examined the issue of duty charts. This decision represented many months of hearings. It is the Glushien Panel decision that the PBA seeks to modify. The City pointed out that the decision concerning training time was a matter strictly within the managerial responsibility of the Police Department. While the daily training that had been in effect prior to the Glushien Report was useful, in the face of the grave financial situation, it is a practice that the City cannot afford to continue. The City also maintained that the twenty-minute daily training periods recommended by the PBA were not the proper method for the type of training done in the four-day training periods currently utilized by the Police Department.

This Impasse Panel examined the voluminous transcripts of the Glushien hearings and studied the documents and evidence presented by both sides of this Panel. Although the testimony and evidence shed some light on the experience of the parties with respect to the present chart, this Panel can see no compelling reason to modify the Glushien award. Accordingly, the Panel recommends that the existing terms and conditions embodied in the Glushien award

(I-124-75) regarding this issue remain in full force and effect.

The Panel suggests that the parties continue to study the police officers' and department's experience under the present chart so that the difficulties referred to at these hearings can be satisfactorily ameliorated for their mutual benefit.

One-Man Radio Patrol Cars

The present manning of radio motor patrol cars in New York City requires assignment of two police officers to each car. The City has presented a plan to the PBA and to the Panel which provides that in approximately 40 of 73 precincts some cars would be operated by one police officer, thus freeing other police officers for additional one-man cars or other duties. This plan was discussed with the PBA and formally rejected. The issue presented to this Panel, in line with the Board of Collective Bargaining decision B-5-75, is not one of a working condition but solely and only the safety impact, if any, of the specific plan presented by the City.

The plan provides that in those precincts in which one-man cars will be operated, one-man cars will not be implemented without first utilizing the scheduled two-man car patrols. The plan also provides a limited utilization of one-man cars. They can only be dispatched to certain types of police incidents that can be safely handled by one police officer. If circumstances require that a one-man car be dispatched to incidents other than intended in the plan, an additional unit or units will be dispatched simultaneously. This plan also provides for training of all members of the force who may be connected with the one-man car operation including communications personnel.

The PBA opposed any form of one-man patrol cars on the ground that it would increase the hazards to police officers. It contended that the safety advantages provided by partners through formal training and experience would be sacrificed in a wide variety of situations not excluding the safe operation of the vehicle itself.

The PBA also disputed the City's contention that the incidents to which one-man cars would be dispatched can be depended upon to be safe. The PBA contended that frequently the incidents were not of the same character as initially reported, and that radio calls, seemingly of a less dangerous nature, can turn out to be more hazardous than contemplated, especially when considering the random nature of urban crimes.

The plan, as presented, is predicated upon the admonition to individual police officers not to expose themselves to particular hazards or to take risks inconsistent with the directives related to the one-man car operation. These directives, the PBA argues, tend to be unrealistic, and may merely result in inefficient and ineffective police action.

Whatever the merits of this PBA argument may be, the question of effective and efficient action is not before the Panel and is indeed barred from consideration by BCB decision B-5-75.

The Panel recognizes that police work may be dangerous and is inherently associated with a risk factor. The Panel is also aware that there presently exist other forms of one-man duty such as foot patrol, scooters and motorcycles. It does not appear to the Panel that the risk feature involved in this one-man car plan would be greater than other forms of one-person duty. Indeed, it might be safer under certain circumstances than other forms of one-person duty since the police officer would have the

benefit of a vehicle shielding him from the elements and certainly would be less prone to vehicular accidents associated with scooters and motorcycles. The use of one-man cars is not a unique practice and many other cities are engaged in this manning procedure. Therefore, the Panel finds no safety impact in the implementation of the City's plan.

Meal Assignment

The PBA has pointed out to the Panel that on occasion there is an inequitable and arbitrary assignment of meals by Police Commanders. The PBA has called the Panel's attention to situations in which police officers who arrive on duty at 8:00 a.m. in the morning of a scheduled 8:00 to 4:00 p.m. tour of duty are assigned a meal period upon arrival or as late as 3:00 p.m. The PBA argues that at times this practice interrupts the police officer's normal living schedule and imposes an unusual and burdensome working condition. Accordingly, the PBA has demanded that there be no assignment of police officers to meal periods during the first or last two hours of their regularly scheduled tours.

The City contends that mandating such a policy for the Police Department, would require excusal of 25% of the total working force from the middle four hours of each tour. The City contends that to do this would be operationally dangerous and impractical for the Police Department.

After consideration of this issue, the Panel recommends that police officers not be assigned meals as a matter of practice during the first 1½ hours of their tours. In cases of emergency this practice may be altered.

Delegate Excusals

During the hearings and mediation sessions both sides extensively discussed the question of paid delegate excusal time. Based on the record and the mediation discussions, the Panel recommends that paid excusal time shall be restricted as follows: delegates performing a tour of duty during the second platoon shall be excused to attend the monthly delegate meetings and those delegates performing a tour of duty during the third platoon shall be excused until 6:00 P.M. to attend the monthly delegates' meetings. There will be no excusal of those members performing duty on the first platoon.

In reaching this conclusion, the Panel is persuaded by the showing made by the City with respect to the far more limited practices applicable to all of the other municipal unions in this City. Nothing in this recommendation is intended to effect, in any way, the policy with regard to delegates attending the annual PBA convention.

Expedited Group Grievance Procedure

The PBA has demanded a modification in the existing grievance procedure by eliminating the fourth step or by combining the third and fourth steps to provide a more streamlined grievance procedure.

The PBA has indicated to the Panel that a mechanism is needed by which grievances can be resolved on an expedited basis when an issue is one that affects substantial numbers of police officers. The proposed modification of the existing procedures would allow, when warranted, for an expedited formal grievance processing procedure.

The Impasse Panel recommends the compression of the present grievance procedures for grievances which affect substantial numbers of police officers by the elimination of

the fourth step. The Impasse Panel further recommends that a request by the PBA for an expedited third step meeting on these group grievances be convened within five days of filing. A decision is to be issued within five days thereafter.

No-Fault Auto Claims Dispute

The City has demanded that, where there is a recovery under the "no-fault" insurance laws for medical expenses and loss of earnings by a police officer and where such recovery is from the City of New York as a self-insurer, such police officers shall transfer the recovered salary claim to avoid an inequity of double compensation when the police officer has already received sick leave pay.

The PBA argues in opposition that the appropriate forum in which to effect a change in the current practices regarding the payment of benefits under the "no-fault" law is the legislature of the State of New York. The PBA further argues that the City's proposal will effect a reduction in health and welfare benefits under the collective bargaining agreement, and that, in view of pending legislation, it would be inappropriate to effect a reduction of such benefits.

The Impasse Panel finds that this matter is best resolved through the legislative process and recommends that this issue await such resolution. Accordingly, the Panel rejects the City's demand.

Portal to Portal

During the course of negotiations the Impasse Panel determined that there was a consensus by the parties regarding this issue. The following is the Impasse Panel's recommendation reflecting such consensus:

(1) All claims for payment of compensatory time off which is earned as provided in Article XXIII of the contract on April 1, 1977 or thereafter must be submitted to the appropriate payroll personnel by the applicant within 180 days from the date payment is earned for payment in cash. All applications submitted after 180 days up to 365 days from the date payment is earned will be granted the appropriate compensatory time off only for claims under Article XXIII.

(2) If a request for payment is timely submitted and rejected by the Police Department, the grievant shall have 120 days from the date of receipt of a written rejection notice to file a grievance pursuant to Article XXIV.

(3) The above clarification shall apply only to Article XXIII claims earned on April 1, 1977 or thereafter.

(4) This clarification applies to a grievance brought under this collective bargaining contract only. It has no applicability to any other legal remedy which an individual may have.

Other Issues

The following issues have been reviewed and were the subject of extensive study in the Sovern recommendations. The Impasse Panel finds that the parties are in substantial agreement on these issues and that no detailed exposition is necessary. Therefore, the following items were herein recommended.

1. The City and the PBA will use their best efforts to effect free transportation on buses and subways for police officers.

2. The City shall continue to apply for CETA or other Federal funding to hire additional police officers.

3. Interest on wage increases shall accrue at the rate of three percent (3%) per annum from one hundred-twenty (120) days after execution of this agreement or one hundred-twenty (120) days after the effective date of the increase, whichever is later, to the date of actual payment. Interest on longevity and step-up increments, differentials, holiday and overtime pay shall accrue at the rate of three percent (3%) per annum from one hundred-twenty (120) days following its earning or one hundred-twenty (120) days after the execution of this agreement, whichever is later, to the date of actual payment. Interest accrued pursuant to this paragraph shall be payable only if the amount of interest due to an individual employee exceeds five dollars ($5.00).

4. A laid-off employee who is returned to service in the employee's former title or in a comparable title from a preferred list shall receive the basic salary rate that would have been received by the employee had the employee never been laid off, but not to exceed the basic rate of entitlement on a date two years from the effective date of lay-off.

5. Where an employee is suspended without pay for disciplinary reasons and is subsequently restored to full pay status as of the effective date of the suspension, the employee shall receive full Annuity Fund, Health and Welfare Fund and Health and Hospitalization Benefits coverage paid by the City for the period of suspension.

6. Individual employee grievants shall be granted leave with pay for such time as is necessary to testify at arbitration hearings. Leave with pay shall be granted to three (3) employees who are named grievants in a group arbitration proceeding for such time as is necessary for them to testify at their group arbitration hearings. Leave with

pay for such time as is necessary to testify at their hearings shall be granted to employees who, after final adjudication of proceedings under Section 210, paragraph 2h of the Civil Service Law, are determined to have not been in violation of Section 210.

7. Where an employee has an entitlement to accrued annual leave and/or compensatory time, and the City's fiscal condition requires employees who are terminated, laid off or who choose to retire in lieu of layoff be removed from the payroll on or before a specific date, or where an employee reaches the mandatory retirement age, the employer shall provide a monetary value of accumulated and unused annual leave and/or compensatory time allowancse standing to this credit in a lump sum. Such payments shall be in accordance with the provisions of Executive Order 30, dated June 24, 1975.

Where an employee has an entitlement to terminal leave and the City's fiscal situation requires that employees who are terminated, laid off or retire be removed from the payroll on or before a specific date, or where an employee reaches the mandatory retirement age, the employer shall provide a monetary lump sum payment for terminal leave in accordance with the provisions of Executive Order 31, dated June 24, 1975.

8. When a layoff occurs, the City shall provide to the PBA a list of employees who are on a preferred list with the original date of appointment utilized for the purpose of such layoff.

9. Thirty days prior notification shall be provided in the event of proposed further layoffs and shall be discussed in an attempt to avoid such layoffs, pursuant to Hilton Interim Agreement of June 30, 1976.

10. As soon as the City deems practicable but in no event later than July 1, 1978, retirees shall have the option of changing their previous choice of Health plans. This option shall: (a) be a one-time choice; (b) be exercised only after one year of retirement; (c) be exercised at any time without regard to contract periods; (d) be changed to a new plan, which will be effective the first day of the month three months after the month in which the application has been received by the New York City Health Insurance Program.

11. The final paycheck of any police officer who retires during any deferral period will be subject to an offset equal to the pro rata balance of the increase which is deferred for that period.

DURATION

The Panel recommends that a new formal two-year contract for the period 7/1/76 to 6/30/78 be executed embodying the provisions of these Recommendations, the Interim Report and Recommendations dated April 8, 1977, and the continuing provisions of the agreements under which the City and the PBA have been operating. The Panel recommends that there be no increases or adjustments to salaries or wages other than as provided for in the Hilton Agreement dated June 30, 1976. The Recommendations herein are subject to applicable law.

All of the items and demands for which this Panel has not expressed a recommendation are deemed withdrawn and nothing herein contained shall affect any of the parties' rights in respect thereof.

This Report and Recommendations represents the culmination of long hours of hearings and mediation efforts.

It represents the hard work and intelligence of dedicated representatives of the City and the PBA. This document also reflects the best efforts of the Panel to measure the issues against the legislatively mandated criteria for impasse deliberations.

It is the belief of this Panel that the "package" contained herein represents a fair and equitable settlement of the issues at impasse and will finally lay this dispute to rest.

/s/ EDWARD LEVIN
Edward Levin
Impasse Panel

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

On the 10th day of June, 1977, before me came EDWARD LEVIN, to me known and known to me to be the individual described in and who executed the foregoing instrument, and acknowledged to me that he executed the same.

/s/ HARRY KARETZKY
HARRY KARETZKY
Commissioner of Deeds
City of New York 4-724
Certificate filed in New York County
Commision expires July 1, 1977

APPENDIX C

(Decision and Order)

OFFICE OF COLLECTIVE BARGAINING

BOARD OF COLLECTIVE BARGAINING

DOCKET NO. BCBI-14-77

DECISION NO. B-9-77

PATROLMEN'S BENEVOLENT ASSOCIATION,

Petitioner,

—and—

CITY OF NEW YORK,

Respondent.

Appearances:

Stuart Linnick, Esq.
Robert Cammer, Esq.
of PHILLIPS, NIZER, BENJAMIN, KRIM and BALLON
for PATROLMEN'S BENEVOLENT ASSOCIATION

Alan Friess, Esq.
General Counsel
of OFFICE OF MUNICIPAL LABOR RELATIONS
for THE CITY OF NEW YORK

The one-member impasse panel appointed in the contract dispute for the term July 1, 1976 through June 30, 1978, between the Patrolmen's Benevolent Association (PBA) and The City of New York released its Report and Rec-

ommendations on June 17, 1977. This panel is referred to herein as the "Levin" panel to distinguish it from a prior panel (the Coulson panel) whose procedures are also discussed in this decision. On July 15, 1977, the City of New York accepted the recommendations. On the same day, the PBA rejected the recommendations and on July 25, the PBA filed its Notice of Appeal and Petition. The City filed its Answer on August 4, 1977.

On August 17, 1977, the Board heard oral argument in the matter. By letter of August 22, 1977, the PBA requested that the Board first rule "whether it has jurisdiction or not substantively to consider the award," and that the Board advise the PBA either of its jurisdictional ruling or that it has extended the time within which to rule pursuant to NYCCBL §1173-7.0c(4)(d). The City, by letter of the same date, objected to the PBA requests.

At the oral argument, counsel for the PBA and the City of New York were in agreement and informed the Board that, as a result of negotiations and ratifications of a contract by the PBA membership on August 10, 1977, all subjects of the dispute except the status of the panel's recommendation for deferral of a 6% salary increase for the period July 1, 1976 through June 30, 1977 were settled on the basis of the panel recommendations or on the basis of the further negotiations as ratified by the membership. They sharply disagreed as to whether the parties have reached agreement that would be dispositive of the 6% salary deferral issue.

The PBA, although declining to withdraw its appeal of the recommendations of the panel made an oral motion that the Board consider the entire case moot. The PBA argues that the parties had agreed in their negotiations

that the issue of the 6% wage deferral for one year be decided by a case now pending in Supreme Court. The City disputes the PBA's contentions, asserting that the issue of the 6% deferral is still pending before the Board, and alleging that the parties only agreed during their negotiations that the City could pursue all its rights in the appeal pending before the Board.

The Facts

Prior Impasse Award

On April 30, 1975, an impasse panel (the Coulson panel) appointed to make recommendations for a contract period of July 1, 1974 through June 30, 1976, issued its report and recommendations. So far as relevant herein, the panel recommended a "6% wage increase in the basic rate for fiscal 1976-76, effective July 1, 1975" (Docket No. I-115-74).

The Court of Appeals, in *PBA* v. *City of New York,* 41 NY 2d 205 (1976), described what ensued thereafter:

> "The Panel's findings were accepted in writing by both parties and neither sought to appeal the determination to the Board of Collective Bargaining, although the avenue was open to them. Subsequently, the Panel's findings were incorporated into a tentative collective bargaining agreement. While the representative of the PBA signed this tentative agreement, the City refused to do so, giving as a reason the City's increasingly grave financial outlook.
>
> "Faced with the City's refusal to execute and perform the agreement, the PBA, by order to show cause, brought on a proceeding under Article 75 of the CPLR to confirm the award of the Impasse Panel. The City cross-moved to dismiss the petition on the ground that the decision of the Impasse Panel did not constitute

> an award within the meaning of Article 75. The City's cross-motion was denied. The City having subsequently failed to timely serve its answer to the petition, the petition was granted upon default, and the Impasse Panel's determination was confirmed by an order and judgment dated and entered on July 1, 1975.
>
> "Thereafter the City commenced computing and paying the retroactive salary increase for the 1974-1975 fiscal year and the increase ordered for the 1975-1976 fiscal year, in compliance with the terms of the July 1st order. In September 1975, however, the Legislature enacted the law freezing the wages of the City's employees [citations omitted] and the City immediately discontinued paying the 1975-1976 increase."

The Court of Appeals ruled that the Financial Emergency Act (FEA), Laws of 1975, ch. 868, as amended, was not applicable to the judgment obtained by the PBA two months prior to enactment of the FEA. Therefore, the City was obligated to pay the 6% increase for fiscal 1975-76 as recommended by the Coulson panel. Other municipal unions, pursuant to FEA §10, had deferred similar wage increases to which they would have been entitled. Thus, the PBA membership unlike other City employees, received a wage increase for fiscal 1975-76.

Interim Recommendations of Levin Panel

On April 8, 1977, the panel in the instant impasse, the Levin panel, issued an Interim Report and Recommendations. The panel recommended, in substance:

1) Payment of a cost of living adjustment, effective July 1, 1976, per police officer.

2) Contribution by the City of $400 per/annum per covered retiree commencing July 1, 1976:

> "Prior obligations for the period July 1, 1974 through June 30, 1976 of City payments to retirees welfare fund shall be credited to the PBA's share of the $24 million per annum fringe benefit reduction required by the Hilton Interim Agreement."

3) "Deferral of the City's annual annuity contribution in the amount of no more than $200 per year per employee for the period July 1, 1976 to June 30, 1978."

The panel's finding on item 1 including its retroactive effect was urged by the PBA. The findings as to items 2 and 3 which also have retroactive effects were sought by the City. Both parties accepted the Interim Award. Neither party at any time raised any question as to the panel's authority to make such findings covering the entire contract period including retroactive provisions altering conditions which had prevailed pursuant to the status quo prescribed by Sec. 1173-7.0d.

Litigation In Supreme Court

Subsequent to the appointment of the Levin impasse panel and the issuance of its Interim Award, on April 22, 1977, the PBA commenced an action against the City of New York in Supreme Court for a declaratory judgment. The complaint sought a judgment declaring that "these police officers are entitled to status quo continuation of the salary scales and related benefits established for them and which they began to receive for the 1975-1976 fiscal

year." The complaint alleged that the City had failed to continue the 6% wage increase resulting from the earlier wage freeze litigation beyond the June 30, 1976 termination date of the earlier impasse panel recommendations. The relief sought by PBA, *inter alia,* was a finding by the Court that "Until the parties enter into a new collective bargaining agreement, the City is required to continue to compute and to pay salaries and related benefits at the same rates for fiscal 1975-1976."

The City of New York served its Answer, dated July 12, 1977, which relied, in substance, on the Report and Recommendations of the Impasse Panel herein that there be a 6% deferral for July 1, 1976 through June 30, 1977.[1] The Answer alleged that the panel, pursuant to its power to rule retroactively in the dispute before it, had recommended the deferral, and that any appeal of the panel's recommendations must be brought before the Board of Collective Bargaining. The City further alleged that payment beyond June 30, 1976 was not required by the judgment in the prior case and was not included in the status quo because it did not arise from the collective bargaining process.

No further action has been taken by either party to advance the litigation of this matter.

Final Recommendations of Levin Panel

The City contended before the Levin panel that its recommendations should include deferral of 6% of the wages for 1976-77 in order to rectify the "imbalance in the total financial structure under which the City has been operating

[1] These Recommendations are discussed more fully below.

during the fiscal crisis," and on the ground of comparability with other uniformed forces.

The PBA, in its argument to the panel, contended that the imbalance was due to the City's own prior actions, that the status quo provisions of NYCCBL §1173-7.0d barred the requested wage deferral, and that the panel should not rule on the 6% deferral because the matter had been presented to the Supreme Court for determination.

The Levin Panel recommended that 6% of the wages of unit members be deferred for the period July 1, 1976 through June 30, 1977. The panel said:

> "Such deferral shall be subject to each and every term and condition of the deferral agreements covering the period 1975-1976 as executed by the other municipal labor unions. It is understood that effective July 1, 1977 the aforesaid deferred 6% salary increase shall be included in the salary of police officers as expeditiously as possible." (page 9)

The Panel discussed the rationale which supports its deferral recommendation. Although recognizing that the lack of a prior PBA deferral agreement might be "of the City's own making", the Panel found that the imbalance created between the PBA and other municipal unions was "in conflict with the statutory criteria of comparability" of NYCCBL §1173-7.0c(3)(b); and that "the failure of the PBA to defer has created an anomaly in this impasse as well as in the overall municipal labor relations in the City of New York." Further, the panel found that it was not barred by the status quo provisions of the NYCCBL from recommending a wage deferral retroactively to the initial date of the 1976-1977 contract. It held:

> "Since the Panel's mandate is to fashion recommendations commencing July 1, 1976, the Panel is not precluded from exercising its legitimate responsibility to so rule simply because it is considering the issues at a time after July 1, 1976."

Finally, the Panel considered PBA's contention that it should not rule on the 6% deferral because of the litigation pending in Supreme Court.

The Panel rejected this argument, and reasoned that if the Panel did not make recommendations for a 6% deferral for July 1, 1976 through June 30, 1977, it would thereby be precluded from recommending that, upon the end of the deferral period, the 6% be paid to the police officers. The panel found that by failing to rule it would leave the "salary issue in limbo with possible adverse and unintended consequences", since litigation and appeals in this matter could cause police officers to continue to receive less than other comparable City employees, possibly for years. The Panel found that such a situation would be "most disruptive to the City and financially disadvantageous to police officers."

At Oral Argument, the parties advised us that they entered into extensive negotiations with regard to recommendations of the impasse panel. Following this, the PBA submitted what it considered to be the results of the negotiations to its membership. The ratification by the membership was recorded on August 10, 1977.

Jurisdiction of the Board

As recited above, the parties disagree over the 6% litigation; specifically, they disagree whether the City, as part of the settlement ratified by the PBA membership,

was obligated to relinquish its rights before this Board and could continue to press its rights only in Supreme Court. This disagreement, if pursued through legal determination, would be within the exclusive jurisdiction of the Public Employment Relations Board under the Taylor Law, §209-a of Civil Service Law, Article XIV. Thus, we shall not decide what the terms of the settlement were, if any, concerning the 6% litigation. Our decision herein therefore is without impairment of the respective rights of the parties in all other fora with regard to whatever modifications of the panel recommendations they may be found to have agreed upon subsequent to the issuance of the recommendations.

We have the power and the duty, however, not only to construe the status quo requirements of New York City Collective Bargaining Law (NYCCBL) §1173-7.0d, but also the power and the duty to rule on the PBA appeal from the 6% deferral recommendation of the impasse panel.[2] The PBA has specifically declined to withdraw this appeal, but has urged us to consider this matter moot. Clearly, however, the matter is not moot; it continues to be a subject of contention and dispute between the parties. Nor is our jurisdiction based solely on the pendency of the PBA's appeal nor on such rights as the City may assert to a final adjudication by the Board of the issues thus presented. The Board, itself, is authorized by §1173-7.0c(4)(a) "upon its own initiative [to] review recommendations which have been rejected." However equivocal may be the PBA's position as to its appeal, there can be no question that it rejected the panel's recommendations.

Moreover, to find that we do not have jurisdiction would be to abdicate our statutory duty pursuant to NYCCBL

[2] NYCCBL §1173-5.0a.

§1173-7.0c to administer the impasse procedures and to rule on appeals from impasse panel recommendations. As the administrative agency charged with the interpretation and administration of the NYCCBL, this Board has the duty, in the first instance, to issue interpretations of this statute. The suggestion that we defer such interpretation to the Court would be contrary to the statutory scheme of the NYCCBL. Consequently, we view PBA's commencement of an action in Supreme Court for the purpose of litigating its rights under the NYCCBL to be premature because PBA has not exhausted its administrative remedies.

Further, we note that PBA, had it wished timely to raise the issue of the panel's power to recommend retroactive deferral of wages, was free to file a scope of bargaining petition pursuant to NYCCBL §1173-5.0a(2).

Discussion

Neither at the oral argument on August 17, 1977, nor in its letter of August 22, 1977, has the PBA presented to this Board any statutory justification for a separate decision of the question of jurisdiction. Accordingly, we follow our regular practice of ruling on all questions raised upon review of the Report and Recommendations of an impasse panel.

The Board set forth the standards for review of impasse panel recommendations pursuant to NYCCBL §1173-7.0c (4) in its first decision upon an impasse panel appeal:

> "We interpret this section of the law as creating a form of appeal procedure and not as warranting *de novo* proceedings following the rejection of an impasse panel's Report and Recommendations; in fact, it may be said that the concept of review is inconsistent with

that of hearing *de novo* except in extraordinary circumstances. We do not conceive it to be our function in such proceedings to substitute our judgment, in determining the facts and adjudicating the merits, for that of an impasse panel. Our principal statutory responsibility is to examine the record to determine whether the parties have been afforded a fair hearing and whether the record provides substantial support for the result reached by the impasse panel; if it does, the fact that an interested party or that the Board might be able to conceive other results is not controlling. If the impasse panel has afforded the parties full and fair opportunity to submit testimony and evidence relevant to the matter in controversy; unless it can be shown that the Report and Recommendations were not based upon objective and impartial consideration of the entire record; and unless clear evidence is presented on appeal either that the proceeding have been tainted by fraud or bias or that the Report and Recommendations are patently inconsistent with the evidence or that on its face it is flawed by material and essential errors of fact and/or law, the Report and Recommendations must be upheld." [3]

We find that the Levin panel properly performed its duties pursuant to NYCCBL §1173-7.0c(3). The panel fully and fairly considered the facts in the record, the arguments advanced by the City and the PBA,—giving special and detailed attention to the 6% deferral—and made its recommendations in light of the statutory standards set forth in §1173-7.0c(3)(b).

[3] *City of New York* and *Podiatry Society of the State of New York*, Decision No. B-23-72.

We find further that the panel's conclusions as to its power and jurisdiction under the status quo provisions of NYCCBL §1173-7.0d are in accord with the statute and with our own prior decisions construing the status quo requirement, and are fully consonant with a recent New York State Court of Appeals decision concerning status quo requirements in public employee labor relations.[4]

The status quo provision of NYCCBL §1173-7.0d provides that:

> "During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement, and, if an impasse panel is appointed during the period commencing on the date on which such panel is appointed and ending thirty days after it submits its report, the public employee organization party to the negotiations, and the public employees it represents, shall not induce or engage in any strikes, slowdowns, work stoppages, or mass absenteeism, nor shall such public employee organization induce any mass resignations, and the public employer shall refrain from unilateral changes in wages, hours, or working conditions. This subdivision shall not be construed to limit the rights of public employers other than their right to make such unilateral changes, or the rights and duties of public employees and employee organizations under state law. For purpose of this subdivision the term 'period of negotiations' shall mean the period commencing on the date on which a bargaining notice is filed and ending on the date on which a collective bargaining agreement is concluded or an impasse panel is appointed."

[4] See *BOCES of Rockland County*, discussed *infra*.

We have consistently held that the statutory purpose is to preserve the balance between the parties during their negotiations by preventing unilateral changes by either party. In *District No. 1, MEBA and City of New York,* Decision No. B-1-72, we held:

> "We are of the opinion that the meaning and purpose of the status quo provision of the NYCCBL is to maintain the respective positions of the parties and the relationship between them essentially unchanged during periods of negotiation, during impasse panel proceedings and for thirty days after issuance of panel reports. This end is obtained, in part, by prohibiting the change of any condition created by a prior contract during the period prescribed by the status quo provision. This interpretation of the status quo provision is consistent with the policy enunciated in the Report of the Tripartite Committee of March 31, 1966. The 'rights normally enjoyed by employees in private employment (but) not available by law to employees in public employment' are, in our view, intended to be replaced by the assurance that upon termination of a prior contract the terms and conditions of their employment cannot be reduced or otherwise changed except by negotiation during the statutory period. The denial of the power to strike is balanced by the maintenance of the status quo."

The status quo provision of the statute was not intended, and has never been construed, to prevent the parties or an impasse panel from making retroactive alterations in terms and conditions of employment, including wages. The essential purpose of a status quo requirement is to preserve

equilibrium while actual negotiations are taking place. This purpose does not forever freeze previously established terms and conditions of employment, nor does it require that the parties or an impasse panel should be barred from effecting changes retroactively to the initial date of the contract at issue once the period of unsuccessful negotiations for said contract has terminated.

Due to the various conditions affecting public employee labor relations in the City of New York, most collective bargaining agreements are executed and implemented after their effective date. Similarly, impasse panel recommendations are issued and become final and binding after the beginning of the new contract period.

The retroactive effect of impasse panel recommendations has not previously been questioned. Indeed, the PBA has in the past accepted the right of an impasse panel to rule retroactively.[5] In the very case before the Board, the Interim Recommendation of the Levin panel, issued on April 8, 1977, provided for retroactive increases and retroactive decreases in the benefits received by police officers. The Interim Report is clear that the PBA argued strenuously for the retroactive increase in the form of "old COLA"[6] while at the same time urging postponement of retroactive "give backs" on the ground that such retroactive decreases in benefits could be considered in the panel's final report. The PBA did not argue that the Levin panel had no power to order "give backs." As described above, the panel's Interim Recommendations provided for both retro-

[5] The Coulson panel issued its recommendations on April 30, 1975, for a contract period of July 1, 1974 to June 30, 1976; it included retroactive increases in the wage levels theretofore prevailing and maintained during the status quo period.

[6] Cost of Living Adjustment.

active increases and decreases; the panel recommended "old COLA" payments of $441 per officer, effective July 1, 1976, and the panel recommended retroactive reductions in the City's obligation to make welfare payments and retroactive deferrals in the City's annuity contributions. The City and the PBA accepted these Interim Recommendations. The PBA did not allege that the status quo requirements of NYCCBL §1173-7.0d barred the retroactive ruling contained in the Interim Report. It is clear, therefore, that the PBA position herein is not only contrary to the language and intent of the status quo provision but also inconsistent with PBA's own actions and formal positions taken earlier in this proceeding.

As indicated above, the PBA position is contrary to the policy expressed in a recent ruling of the Court of Appeals in *BOCES of Rockland County* v. *NYSPERB et al.*, —— NY2d —— (May 12, 1977). In that case, while expressing limited approval of PERB's "Triborough Doctrine" for maintenance of the status quo, the Court nevertheless prohibited any change in the salary of employees during a period of negotiations, even when such changes amounted only to the payment of annual increments. The Court held that the "existing relationship" must be preserved during the negotiations, but that the status quo may not be used to "lock the employees into a guaranteed gain position." An effect of the Court's ruling was that, especially in a time of fiscal crisis in local government, employees covered by contract negotiations should not receive an increase in economic benefits while the negotiations were taking place, because such increase would constitute an inequality and work an imbalance in the respective positions of the government and the union involved. Such an unfair imbalance would result if we

adopted the PBA contentions herein. If no retroactive treatment of benefits were possible, the employees would profit from a prolongation of impasse procedures. Each day that the negotiations of impasse proceedings continued, unit members would accrue benefits not subject to examination and rulings by the panel. Such a situation would, in the language of the Court of Appeals impermissibly "lock the employees into a guaranteed gain position."

Summary

We find that as to all issues covered by its recommendations the impasse panel herein fully and fairly considered the facts in the record, the arguments advanced by the City and the PBA, and properly applied the statutory standards and criteria set forth in NYCCBL §1173-7.0c (3)(b).

We find, further, that the recommendation for deferral of 6% of police officers' basic wage rate for the period July 1, 1976 to June 30, 1977 was properly within the competence of the panel, was consistent with wage policy for all City employees, and constitutes a vital element in the symmetry of rights and duties of the parties established by the panel herein. Accordingly, we shall affirm the entire Report and Recommendations. Such affirmance is without prejudice to the right of the parties regarding such amendments and changes in the terms of the recommendations or of their collective bargaining relationship as they may have reached or may hereafter reach by direct negotiation and mutual agreement.

O R D E R

Pursuant to the power vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

Appendix C

DETERMINED, that the impasse panel's Report and Recommendations including the Interim Report and Recommendations were fair and proper and in accordance with the facts and the law; and it is further

ORDERED, that the Report and Recommendations including the Interim Report and Recommendations be, and the same hereby are, affirmed; and it is further

ORDERED, that the respective rights of the parties with regard to whatever modifications of the Report and Recommendations they may have agreed to are hereby reserved.

DATED: New York, New York.
August 23, 1977.

Arvid Anderson
Chairman

Walter L. Eisenberg
Member

Eric J. Schmertz
Member

Virgil B. Day
Member

Edward F. Gray
Member

Frances M. Morris
Member

Edward J. Cleary
Member

APPENDIX D

(Proceedings)

OFFICE OF COLLECTIVE BARGAINING

BOARD OF CERTIFICATION

In the matter of the

CITY OF NEW YORK

—and—

PATROLMEN'S BENEVOLENT ASSOCIATION

---

250 Broadway
New York, New York

August 17, 1977
3:30 p.m.

Before:

ARVID ANDERSON, *Chairman*
WALTER L. EISENBERG
ERIC J. SCHMERTZ
MS. FRANCES MORRIS
DANIEL PERSONS
EDWARD GRAY
EDWARD CLEARY

Appearances:

For the City of New York:

ALAN FRIESS, ESQ., General Counsel for the Office of Municipal Labor Relations

Appendix D

For the Patrolmen's Benevolent Association:

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON, ESQS.
40 West 57th Street
New York, New York 10019

By: ROBERT I. CAMMER, ESQ., *of Counsel*
and
STUART LINNICK, ESQ., *of Counsel*

The Chairman: We have pending before the Board of Collective Bargaining, the appeal of the PBA from an Impasse Panel determination. And we have a City answer to that appeal. And we have today received a joint request, an oral request from the PBA, from the Office of Municipal Labor Relations to argue before the Board of Collective Bargaining concerning that pending matter.

Mr. Friess: Mr. Chairman, I don't want to interrupt you. I don't think that it would be totally accurate to say that this is a joint request. The request is of the PBA, with the consent of the Office of Municipal and Labor Relations.

The Chairman: Thank you.

With that leave, Mr. Linnick?

Mr. Cammer: If I may, since this is on rather short notice at our request, may I very briefly state the PBA's position, and formly [sic] apprise the Board of a matter that has since taken place. And then perhaps Mr. Linnick can then say a word or two.

After Professor Levin rendered his award, the parties engaged in further negotiations. I am sure the Board is mindful of those negotiations. And they have been widely reported in the press.

Appendix D

My purpose is simply formally to advise the Board that the negotiations resulted in a collective bargaining agreement.

The parties met and agreed that the terms of the arbitrator's award would be modified in many respects. They discussed among other things what to do about the court case which the PBA had started, which concerned the continuation of the benefits which had been awarded under the earlier Impasse Panel Award, and in a 1975 Supreme Court judgment. And they agreed to modify the terms of the arbitrator's award, and agreed further that as a part of that Collective Bargaining agreement, the PBA could continue its court suit subject to whatever defenses the City had.

In that connection, the PBA advised the City that it required the ratification of its membership vote. So on July 25, Samuel DeMilia, as President of the PBA, sent a letter to all of the 20 some odd thousand members. And this letter reflected the terms that had been agreed upon in the negotiations. And I would like to hand up a copy of the letter for the Board.

(Handing.)

At the time this letter was sent out, copies were sent, as well, to the City. So I am advised by Mr. DeMilia, and the labor negotiator for the PBA.

Mr. Friess: If I might, before receipt of that in evidence or for whatever purpose, I will concede the fact that we received copies of this. Whether it was sent to us or whether we went downstairs to the twenty-first floor is irrelevant. We received copies of this.

But in no way will I concede that that which is contained in here respectively is accurate or reflective of what ever agreement the parties may have had.

It would be my position, if necessary, to elaborate further, that this is a self-serving declaration, an internal political document; it is worth no more than that.

I just want the Board to have an accurate understanding of, while I am not objecting to your looking at it and seeing it for whatever reasons, we do not concede that it has any substantive truth for the purposes of this proceeding.

Mr. Cammer: I don't think there is a statement of fact in this letter. But I am not about to say as an attorney for a client.

My purpose is simply formally to tell the Board that the PBA's statement to us is confirmed in this letter as the terms of the agreement. As far as I know, the City, who was given copies of this have never objected to its accuracy.

The Chairman: We will receive it.

Mr. Cammer: In any event, my purpose is simply to point out two things—

The Chairman: Hold on.

Mark it.

(Whereupon a document dated July 25, 1975 was marked as Exhibit 1 in evidence, as of this date.)

The Chairman: All right, proceed.

Mr. Cammer: I only want to make two points as a result of what I have said.

The question is not whether the PBA, or the City for that matter, should withdraw all or part of their respective PBA notice of appeal, or the City's answer.

We submit that the sole jurisdiction of the Board is to resolve an impasse.

Of course, we can't prevent, we don't wish to prevent Mr. Friess or any other City agency from making an application for the Board to do something in this matter.

After all, the understanding was that the PBA could continue its court case subject to whatever the defenses the City had. And I can understand why the City may wish to establish whatever defenses it may wish.

The point simply is as follows, however: first, there is simply nothing before the Board.

The Chairman: I don't understand that. We have a formal request from the PBA, as the record of appeal.

Mr. Cammer: I know that.

And what I am submitting to you is that the party's agreement has resolved the impasse.

The agreement substantially deviates from the terms of Professor Levin's award, and it is clear law. I think it needs no citation. But where the parties have reached an agreement that the impasse is broken, and your function no longer exists in this context any more.

There is no longer an impasse, it has been resolved, so therefore actually to permit an award to become final, an award in which many respects no longer states the terms of the parties arrangements, its understanding, is not only an act of futility, but I respectfully it exceeds the Board's jurisdiction.

I will not belabor the second point, except to say if the Board doesn't agree with this, and I think it must, the fundamental integrity of the status quo rule is at stake. And for that reason of the Board was advised to consider the matter and say that it is still before it, I really think I must, and for the reasons all ready stated, in the notice of appeal reverse that portion of Professor Levin's award concerning the 6% case.

Now, if I may, I will just ask Mr. Linnick to say one or two words.

Mr. Linnick: Unless there are any questions at this point.

The Chairman: You can address us later after Mr. Friess has made his presentation; whatever you wish.

Mr. Linnick: Let me just embellish on one comment, if I may.

The mere fact we have a notice of appeal before you is not determinative, as your question may have suggested, because you could well consider this as a motion to dissolve. So that there is nothing for you to rule upon because the issue is moot.

The Chairman: Are you withdrawing your appeal?

Mr. Linnick: I don't think it is necessary.

If I withdraw, Mr. Anderson, and you decide that there is something before you, I have nothing pending before you.

I am saying this goes in two stages.

If I may persuade you that the issue is moot, there is a completed agreement, then you have nothing to decide.

If on the other hand you disagree with me, I don't want to waive our position on the 6 per cent.

Understand, if you will, there is one other facet of this.

It is clear that as to all of the issues other than the 6 per cent, the parties have resolved that in a tangible way.

As for the 6 per cent issues, the parties have resolved that by agreeing in effect to disagree.

We have agreed that we will continue with our court suit.

Therefore, the issue is, there is really nothing further for the OCB to rule upon.

Now I don't believe that the OCB treating this as moot is dependent upon our withdrawing our notice of appeal; not in any way.

And I hereby make that motion; that is, the OCB consider or dissolve its function in this respect, and consider

this moot. And that would be in a form of a motion that I am making.

And so in the event that it is denied, then, I, of course, want to proceed with the 6 per cent.

It is true, of course, that I haven't treated the other issues other than the 6 per cent with the same degree of attention, because it is clear that they have been resolved substantively, whereas the 6 per cent question has been resolved by saying that we will continue to disagree and carry on our court case.

So I don't think it is at all dependent upon our withdrawing our appeal for you to take that position.

The Chairman: All right. Mr. Friess?

Mr. Friess: Thank you.

I will say at the outset that there are two very pleasing reasons why I am happy to be here today. And the first is that it isn't often that two former Legal Aid Society attorneys such as Mr. Robert Cammer and myself have a chance to argue against each other.

The Chairman: I could understand why the City of New York may employ a Legal Aid attorney. I don't know why the PBA needs to employ one.

That is no reference to skill, sir.

Mr. Friess: Perhaps it is affirmative action on their part.

Secondly, that because of the hastiness of the way in which the PBA requested oral argument in this matter, I will assume that the Board, to the extent that there is a lack of strength, or to the extent that there are any weaknesses in may argument, I will presume or at least hope that the Board will attribute that to the lack of preparation as opposed to mental deficiencies on counsel's behalf.

When it goes to comments, let me say that there is not a completed contract between the City and the PBA.

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We would love to have a completed contract with the PBA. But for whatever reasons, they are contesting one mandatory subject of bargaining, and that is not included within the terms of any agreement that exists; specifically the 6 per cent that they wish to have in wages for fiscal year 1977.

So that despite Mr. Cammer's and Mr. Linnick's assertion to the contrary, there is no contract before the Board. And because there is no contract, we have to fall back at the very least upon the Impasse Panel's recommendations; which are before the Board for consideration, and which addressed itself to the very issue that is unresolved; namely the 6 per cent for that fiscal year.

For the PBA to argue that mootness or lack of a case, or controversy in this instance is not factually accurate.

If I were to sit down and want to write a contract with them today as to what it is that they consider the membership to have voted upon, and the City to have offered, we could not do that. Because we have absolutely no agreement on the 6 per cent issue.

So it is just factually inaccurate to talk in terms of a mootness, or a lack of controversy arguments.

Now I can understand, for whatever reasons, the PBA does not want to make a decision, they don't want to decide what to do with their pending petition before the Board.

They have a petition, it objects to certain of Professor Levin's recommendations.

Arguendo, all of the issues in this petition have been resolved but for the 6 per cent.

They have a choice of withdrawing that portion which has been resolved, and to that extent I would submit that this is not an issue before the Board.

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However, they can't say that as to the 6 per cent, an issue that is something which this Board will have to consider based on their pending petition. They can withdraw the whole petition if they wish, and then they will suffer, if any, whatever consequences will flow from the fact that they withdrew it.

I'm not prepared at this time to say in what fashion the City can or will use their withdrawal of their total petition.

I cannot say, and I will not address myself at this point to what the Board's jurisdiction is if they did withdraw in total.

As far as I am concerned, the purpose of this Board is to determine a petition pending in front of you. That petition can, as all petitions, can be modified; it can be withdrawn unilaterally with consent of the parties whatever.

We do not consent to this petition not being before the Board.

As far as I am concerned, the Board has an issue, and should decide all the issues until such time as the PBA notifies this Board in writing, that there is a change in their pleadings because of some subsequent event which makes this Board's determination unnecessary.

I don't believe also that it is the function of this Board to counsel the PBA, or counsel for the PBA as to what you might do if they do something.

I don't believe we should—that they are entitled to a hypothetical conclusion on what are the possibilities.

We can discuss it informally if they wish, which we have done before. But for this Board to make a ruling which they can then use as a springboard in some way would be perhaps outside of the Board's scope of jurisdiction.

Mr. Cammer: Could we just ask a hypothetical question? We don't understand what they hypothetical question is.

The Chairman: Just a minute.

We will take a brief recess.

(Whereupon a recess was taken.)

The Chairman: On the record.

Mr. Friess: If I may interject one other thought for whatever it is worth.

Mr. Cammer said that the City agreed that they could take their case to court; that is true.

The City, as part of the total package the PBA wanted to give to its membership, agreed that as a condition precedent to their going to court we would not extract from them a waiver that they could not use that forum if it were available for them.

However, at no time did the City agree that we would not pursue, the City, all of our legal remedies, including those before OCB. And while I don't believe that there is any contention about that matter, I just want the record to be perfectly clear that we intend to exercise whatever legal rights that we have in front of OCB; and especially insofar as this is a matter still on your docket, which has in no way changed since the last time any legal papers were sent in to you.

The Chairman: Mr. Cleary, an alternate labor member has just arrived.

Mr. Friess, on this agreement, or disagreement question, does the City agree with the PBA that it has reached an agreement in all other respects on the new contract except for the 6 per cent issue, based upon Mr. Levin's award and such other supplementary agreements as the PBA and the City of New York may have negotiated?

Mr. Friess: To my knowledge, yes.

The Chairman: So as far as you are concerned you could stipulate that as a fact?

Mr. Friess: To my knowledge I could.

The Chairman: Mr. Linnick and Mr. Cammer, is that a correct statement?

Mr. Cammer: Yes.

Mr. Linnick: Yes.

The Chairman: As to whatever disagreement, you say whatever disagreement centers on the issues of 6 per cent. Mr. Cammer is that fair to say?

Mr. Cammer: Yes.

Mr. Linnick: Yes.

The Chairman: Now you want to say something?

Mr. Linnick: Yes.

Responding to Mr. Friess' comments, he talked about the agreement reached on the 6 per cent, about the PBA going to court.

It wasn't an agreement of the PBA going to court. The PBA was in court. The suit had been commenced prior to Professor Levin's even ruling upon this.

The Chairman: Where is it now, Mr. Linnick?

Mr. Cammer: It is at issue.

Mr. Linnick: Complaints and answers.

Mr. Friess suggested it was an open item, because you could not write a contract with this outstanding. I think we all know that that is not so.

One could easily draft a contract which could leave to the arbitrator or another forum, the resolution of a particular item.

I can refer to fire contracts, which Mr. Schmertz is certainly familiar with, where they have left open an item such as the heart bill to be resolved or discussed at a later date.

So there is no problem with drafting an agreement which would leave open a particular matter to be resolved. And

it was agreed that this is the manner in which it would be resolved; that was the agreement.

Mr. Friess: Absolutely not.

Mr. Linnick: You will have your chance.

Mr. Friess: I won't interrupt you again.

The Chairman: Let him continue.

Mr. Linnick: We don't have any problem with completing an agreement where we would leave one matter to be pursued to be determined at a subsequent time. So this is not your run of the mill matter. Because what you have is a Court of Appeals decision just prior to that which stated that the PBA was not—the 6 per cent that the PBA obtained was not subject to the Financial Emergency Act, therefore that the legal status that we were in was you have a judgment where that money, that 6 per cent should have been continued at all times.

So the City took the position that they were simply—it treated it as a one shot deal, or whatever. And they simply didn't pay it, and they didn't continue it. So that with the City, I assume, that possession of the purse is nine-tenths of the law or ten-tenths in this case, but what we really have as a position here is absurd, and it is obscuring reality. Because when the parties negotiated subsequent to Professor Levin's award, what were we negotiating about? What were we talking about?

We were talking about a resolution of the 6 per cent.

It wasn't some obscure thing that was left out hanging. This was one, and indeed in many respects the essence of what was being discussed; how do we resolve it.

And it was resolved by leaving it so that the PBA could continue its court case.

Now the resolution wasn't a condition precedent.

It wasn't a condition precedent that we withdraw. That was put aside.

It was understood that we could proceed ahead, it is almost like a summary judgment situation in which one party is striving to create an issue of fact.

Here we have the City striving to create an open issue.

That is what we negotiated. The newspapers carried it.

I don't think it is a surprise for anyone. Everyone knew what was being negotiated. Everyone was apprised of what happened afterwards.

The News had an article which people thought was a leak.

There was a discussion about releasing Professor Levin's report. This was resolved. And it was resolved in a particular fashion.

The Chairman: Mr. Linnick, whatever your legal rights as to the PBA with respect to the 6 per cent in court, there isn't any question that Professor Levin extensively, and perhaps much more than any other issue, discussed the 6 per cent and reached a determination on the 6 per cent, and that issue is before him.

Now what are you telling us the impact before us right now is?

Mr. Linnick: We have reached a determination and the parties agreed that we would litigate this.

We will continue our court case, so that was the agreement.

There really is nothing for the OCB to decide.

You have an arbitrator's recommendation, and you have us continuing with our court case.

Of course, the City is free to argue before you any arguments they want to raise, and ask for your affirmance.

At the same time, we are suggesting that there really is

—the parties have simply reached an agreement on it, and our agreement is that we will continue with our case.

Mr. Schmertz: Are you saying that constitutes, at least in your judgment, a substitution by mutual agreement of the parties for whatever Professor Levin stated about the 6 per cent?

Mr. Cammer: Yes.

Mr. Linnick: Yes.

Mr. Schmertz: And that therefore, for all intents and purposes that was in the nature of an agreement between the parties, albeit a substantive for any other agreement; is that what you are saying?

Mr. Cammer: Yes, with one caveat.

When Mr. Friess uses the term "absolutely not," I think what he is referring to, and I know he will tell me if I am wrong, is that the City would come and ask the Board to permit the award to become final or come out with an outright affirmance, or by letting the 30 days expire.

And the problem with that, I think, stems from a phrase that he used, and he used correctly; that the City had whatever rights it had.

Well, I don't disagree with the tautology, the PBA doesn't disagree with that tautology.

The problem is the City doesn't have the right anymore to come to the OCB to ask to permit the award. Because the award has been superseded. So the question is, is there any question.

The City has whatever rights it has, and those rights include the right to ask affirmant, that is what the City has done.

But the right to ask doesn't translate into the right to have the answer be yes.

And simply put, Professor Levin's award has been terminated by the agreement which included the term to the effect that the PBA could continue its court case. And I submit that as a matter of policy, there are two very serious issues for the Board, which you need not confront.

The Chairman: Just before you do that, I take it that the point is that the City doesn't agree?

The City doesn't agree that Professor Levin's award with respect to the 6 per cent was terminated by any agreement which would allow you to pursue this matter in court on this issue.

Mr. Friess: That is correct.

Not only do we not agree, but if necessary, I am prepared to call witnesses as to what it was that was agreed on, including witnesses from the PBA.

Mr. Cammer: We welcome that.

Mr. Friess: They are absolutely wrong in characterizing —what they are, in effect, saying is that the City waived its right by some agreement with them to go to OCB. And that is factually incorrect, as well as legally incorrect.

Mr. Cammer: That is not what I said.

The Chairman: I interrupted you because I wanted to be sure I understood.

Mr. Cammer: I just wanted to conclude on two other points. I did not say the City waived its right, I said that the City no longer has any rights.

Mr. Schmertz: May I ask Mr. Friess, if in fact, assuming arguendo, and I know you are taking a different position, that the parties did agree that Professor Levin's award with regard to the 6 per cent would be substituted for by an agreement under which the PBA could pursue its action in court, and the City could oppose that in whatever forum is appropriate, and that constituted a substitution

for whatever Professor Levin said, do we still have any jurisdiction?

Mr. Friess: As far as I know, when there has been any petition pending before the Board in the period of time that I have been General Counsel with OLR, when a matter is finished, resolved, adjudicated or whatever, the parties usually jointly send in a letter saying "This petition is resolved, terminated, withdrawn or whatever."

There is no such letter before this Board, so I can't—it would be presumptuous of me to say you don't have the jurisdiction when you have a case actually before you.

Mr. Schmertz: Will there be anything for us to decide, we clearly have jurisdiction to say something, because there is a petition pending, but will there be anything for us to decide?

Mr. Friess: It is my understanding that where an impasse panel comes down with recommendations, and the parties enter into negotiations subsequent to that and reach a resolution on the issues, the actual issues that that impasse panel made its recommendation about, that the parties having reached agreement on that would normally memorialize that into a contract. And as such, since there is no open issue for the Board to make any determination on, you would not have a matter before you; that we would write a letter emphasizing that having reached agreement, we would send in a letter saying that "we have reached agreement on A, B, C, and D, and there is nothing further unresolved as an issue," therefore we would ask the court to either withdraw, terminate, or whatever the process would be as to the objections.

No such meeting of the minds has occurred in this case. And I want to stress that very strongly.

Mr. Linnick: Well, that can be accomplished right now.

If I were to say to Mr. Friess, for example, that we can consummate that immediately by taking Professor Levin's recommendations, added to what substantially was submitted to the membership, and agreed upon, and we have a completed agreement with one caveat, that I would draft as part of that agreement that it was agreed that the PBA could continue to pursue its court action, which was the whole subject of discussion.

Now that being so, you have your completed agreement, and that can be done verbally right this second.

Mr. Friess: Were I inclined to do that you may not have a case or controversy in front of you. I decline to do that, therefore you do have a case or controversy in front of you.

Mr. Linnick: I am just saying that as a method of demonstrating that the City is trying to create an issue. And I think that has been clearly done.

What we have is exactly the situation that I am describing. It has just been confirmed by my offer to Mr. Friess.

At this point I understand he is taking the position that it is very good for him to have an issue before you. But up until this point, I knew of no issue.

The Chairman: Mr. Linnick, in preparation for consideration of this issue, and doing some preparation because of time restraints, as you well know, which are rather restricted in the statutes; I am not talking about this afternoon, when we had looked at some of the transcripts, not only at the times that we were getting copies of them, but since that time, and, of course, we have read several times Professor Levin's award.

And as you are aware, Professor Levin's most extended discussion in his report on the question of the 6 per cent, and whether he should or he shouldn't defer it. And he

concludes for the reasons set forth that he should not make that kind of an award.

And I notice from the colloquy that occurred during the time that that matter was being presented to Professor Levin, that Mr. Fearon of your office was representing the PBA and Mr. Cooper was representing the City. There is a statement after this colloquy on page 369 of the transcript, where Mr. Fearon says "We concede that the issue of wages is a subject which is properly before the panel."

He makes that statement in the context of obviously arguing his position, that he shouldn't exercise deferral.

There is no question that he had made any such concession, and he argued vigorously against it. But it seems a categorical assertion or concession that the subject of wages implicitly also the subject of deferral is properly before the panel. And therefore is a part of the award, in which it appears is now still pending before us. And we have to do something else, to state it is moot, or to confirm it in whole or in part, we have to do something. And I would like your comments.

Mr. Linnick: No doubt you have read my subsequent comments in that transcript with respect to that same point.

The Chairman: Why don't you refresh all our memories about that.

Mr. Linnick: It is on page 458 I begin discussing this. And what I pointed out was that all of this time that had transpired prior to the Impasse Panel's recommendation, the City should have been continuing the status quo.

Therefore, the Impasse Panel's jurisdiction was only prospective.

It could not violate the status quo, so that its mandate was limited by the requirements of the New York Collec-

tive Bargaining Act which contains the status quo provision.

The City had it in its power to bring the matter to a head long before, however it didn't do so.

So as I pointed out there, it was being rewarded for not living up to the Court of Appeals decision and not having adhered to the 6 per cent all along.

And so my position was that whatever jurisdiction Professor Levin had, it was still within the confines of the statute; namely the status quo position. And when he sought to do something retroactively, that was a jurisdictional flaw that can't be cured.

Then I went on to suggest that he should have deferred it to the court proceeding. So thus far my comment was that whatever mandate he had did not encompass emasculating the status quo position.

In other words, at this point on May 26, when I was making that point, my position was that the City should have been paying all along. We should not have been in this position at this time had they adhered to the statutory requirement.

Mr. Friess: Mr. Linnick appears to me to be arguing against himself.

If he is saying that Professor Levin didn't have jurisdiction, that is an argument that he has to raise before this Board, this Board in conjunction with reading all of the issues will make a decision on whether he had jurisdiction, whether he overstepped it, whether the allegations were arbitrary or capricious. But having conceded or having now stated that he is inquiring as to the jurisdiction of the Impasse Panel, he is saying that there is then an issue before this Board not only on this issue, but apparently on jurisdiction as well. And nothing that he just said obviates

the fact that there is a controversy before this Board, and that there has not been a meeting of the minds on this 6 per cent. And nothing that the City has done subsequently to the hearing, that took place, has changed that situation.

The 6 per cent is as unresolved today as it was whenever the hearings took place.

Mr. Linnick: It is interesting to see how Mr. Friess interpreted what my comments were. I don't think I said what he said at all.

What I said about jurisdiction was that, this was in response to Mr. Anderson's question, was that it was not a waiver with respect to a comment that Mr. Fearon made.

Because what we had was a situation in which the arbitrator was limited by the confines of the Collective Bargaining law, so that he could not go back and take it away, because it should have been made all along. That is not a concession in any way; that doesn't create the issue that Mr. Friess is looking for.

What I am saying is that subsequently the parties agreed they agreed to disagree.

That sort of an agreement can be drafted in a collective agreement. And it has been done. And therefore on this basis, I am suggesting that there really is no issue before you.

Mr. Schmertz: What is it you want us to do from the City's standpoint? What do you think the Board should do with the Levin recommendation on the 6 per cent?

Mr. Friess: Just as to the 6 per cent?

The Chairman: That is what we understand is unresolved.

Mr. Friess: When I see something in writing from the PBA withdrawing any part of their petition, then I will be satisfied that that is not an issue before this Board. After

that, despite any statements in argument by counsel, I think we need a sworn affidavit that whatever issues have been resolved have been resolved by the membership and they no longer wish to contest it.

If they do not wish to contest an issue, then that, as I understand it, will be deemed accepted under the Board rules.

The Chairman: Under the statute.

Mr. Friess: Under the statute, excuse me.

And for whatever that is worth, if anything, the City will take whatever legal action is necessary.

To get back to your question on the 6 per cent, that is before the Board.

The City seeks to have a confirmation of the Impasse Panel's recommendation.

Mr. Schmertz: If we confirm it and deny the petition, and confirm or affirm it, what effect will that have on what I understand is the undisputed phase of the disputed agreement, namely, that the PBA pursues its case in court?

Mr. Friess: If the Board should affirm or confirm the Impasse Panel's recommendations, the City will take that act and use it in whatever legal way is beneficial to the City in this or any other forum including collective bargaining, courts, or what have you.

Mr. Schmertz: As a practical matter, would it not oust the PBA from any realistic opportunity to pursue its litigation?

Mr. Friess: That would be for a court to decide. But I can state to you as a fact, that we have raised this issue in our answer in court, and it is no secret. And that is why we are here. Because they know to the extent that they have any chance in court, they have a lesser chance if the City has a confirmed award by OCB on what we would

allege to be the exact same issue covered by an Impasse Panel.

Mr. Schmertz: Yes, I would think so.

Mr. Linnick: I think Mr. Friess is under the impression or misimpression that he has a horn to deal with, where it is encumbent upon us to withdraw our notice of appeal or petition; that is not so at all.

As I said, I am making a motion for the Board to dissolve with respect to this issue; to consider it moot.

So I am not in the theoretical horns of a dilemma that he supposedly has found.

If the Board does not consider this moot, and they have the facts upon this to make this determination, then they can consider our petition.

If the Board would want to, as Mr. Friess suggested, take testimony on whether or not an agreement has been reached, we would welcome that as well. We are certainly prepared to do that.

Mr. Friess: The motion to dissolve appears to be as to the Board rather than the issues. I would think that the Board should be retained and constituted.

But if the motion to dissolve is a motion to dissolve the petition in whole or in part, then I will request that it be in writing so that we can respond accordingly.

The Chairman: We so understood. We didn't imagine that he was suggesting that we all engage in an act of self-emasculation.

We assume he would be more subtle about those kinds of suggestions.

Mr. Linnick: Well, I gave it as a characterization, perhaps other people could have gave it other words to attach to the motion. But as Mr. Friess pointed out, this was on short notice.

Mr. Cammer: Alternatively, there is a kind of middle ground which the Board might wish to consider, and that I think would allay Mr. Friess' anxiety as to whether there was an agreement. And despite his statements as an attorney with no personal knowledge of the fact that there was no agreement, I think that a hearing would show there was. I don't, however, press for a hearing for a very simple reason.

The Board has Professor Levin's award. If the Board attaches some importance to a piece of paper, the Board, as you well know, has a 30-day additional period which it can afford the parties before permitting the arbitrator's award to become final.

I feel confident that we could easily draft a formal integrated document, within such an additional 30-day period.

I think it is unnecessary for the reasons I have stated, and I won't belabor the Board. But I think the Board should simply say the issue is moot.

But if it doesn't do that, and you don't want the burden of a hearing, let the parties take a crack at writing a document on it.

As to Mr. Friess and his client, let us see a simple document that by reference incorporates the terms of Professor Levin, the terms as set forth in Samuel DeMilia's letter, so be it. We can sit down and write an agreement.

I venture to say that there isn't a single item of fact in disagreement that Mr. Friess can point to.

But as I pointed out, there is a middle ground. The Board may wish to take this alternative, that is, dissolve the petition before it as moot before expiration of the same statute we have been referring to, or give the parties a chance to demonstrate that they can write a letter to the

Board and can say "Fellows and women we have signed an agreement."

Mr. Friess: Just one comment to get the last word in, I see no practical way that that can be done. And I don't think that this attempt although it be in one document that the Board can and should attach it.

At this time the Board is not conceding to any adjournments in this matter based on what the Board has before it at present.

The Chairman: We have, as you know, some vigorous statutory time limits. The first 30 days will be up one week from this date.

If you wish to submit anything else to us, either of you with obviously copies to the others, you are free to do so. We are not directing anybody to do so, but you are free to do so. But you better do it promptly if you expect any consideration, because by the 24th we either have to have a decision or our failure to either make a decision or to extend this will mean that the award is affirmed as a matter of law.

We just don't have any discretion in that regard.

So you will have to communicate with us as to whether you want anything else submitted.

In the meantime, of course, the Board will explore any discussion which we are going to do now, at least preliminarily what other proceedings we are going to have in this matter.

We obviously will talk about the time restraints too. If there are some problems in that regard.

Mr. Cammer: We are confident that if there is a hearing we could prove, not just by a preponderance, but beyond a reasonable doubt, that there was an agreement that we referred to there.

I again wonder if we could ask, this is not a hypothetical question, but advisory, since the Board has the discretion to grant an additional thirty-day period, would it be possible to learn before the expiration of the present thirty-day period whether the Board will do that?

I think that is essential, because the PBA may be advised to seek some kind of redress if necessary, and certainly the City may. Might the parties be advised?

The Chairman: You may be advised shortly, but you can't be advised before we have had an opportunity to discuss the matter.

How soon you will be advised I can't tell you. But we know that you have some tough time limits.

Professor Schmertz reminds me that we have never let the pocket veto procedure apply, and we have always been willing to stand up and swing at the ball, and we will in this instance.

Thank you all.

(Whereupon the meeting was completed at 4:25 p.m.)

CERTIFICATE

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

I, GEORGE BROWN, a Notary Public within and for the State of New York, do hereby certify that the foregoing record of proceedings is a full and correct transcript of the stenographic notes taken by me therein.

IN WITNESS WHEREOF, I have hereunto set my hand this 22nd day of August 1977.

/s/ GEORGE BROWN
George Brown

APPENDIX E

(Order)

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-fourth day of October A. D. 1978

Present,

HON. CHARLES D. BREITEL,
Chief Judge, presiding.

1 Mo. No. 897

In the Matter of the Application of

CITY OF NEW YORK,
Respondent,

For an Order &c.

vs.

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK,
Appellant,

Reviewing the determination of the Respondent in confirming an August 23, 1977, New York City Board of Collective Bargaining Decision &c.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the

Appendix E

part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court